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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether total exemption by the Interstate Commerce Commission of all motor contract carriers of property from the statutory requirements of 49 U.S.C. §§ 10702, 10761, and 10762 to file with the ICC tariffs containing their rates and charges is consistent with the intent of Congress as expressed in the Motor Carrier Act of 1980, 94 Stat. 793, and with the opinion of this Court in *Interstate Commerce Comm'n v. American Trucking Ass'ns*, 104 S. Ct. 2458 (1984).

THE PARTIES

The opinion and judgment of the District of Columbia Circuit consolidated four petitions in Nos. 83-1581, 83-1740, 83-1761, and 83-1973. Petitioners before this Court * were petitioners or intervenors in support of petitioners in Nos. 83-1581, 83-1761, and 83-1973. The Interstate Commerce Commission (ICC) and the United States of America were respondents in all four proceedings.

A complete list of petitioners and intervenors in support of petitioners in the four proceedings below follows:

American Trucking Associations, Inc.
Central & Southern Motor Freight Tariff Association, Inc.
Central States Motor Freight Bureau, Inc.
The Eastern Central Motor Carriers Association, Inc.
Household Goods Carriers' Bureau, Inc.
Middle Atlantic Conference
Middlewest Motor Freight Bureau, Inc.
National Motor Freight Traffic Association, Inc.
New England Motor Rate Bureau, Inc.
Niagara Frontier Tariff Bureau, Inc.
Pacific Inland Tariff Bureau, Inc.
Regular Common Carrier Conference
Rocky Mountain Motor Tariff Bureau, Inc.
Southern Motor Carriers Rate Conference, Inc.

A complete list of respondents and intervenors in support of respondents in the four proceedings below follows:

Interstate Commerce Commission
United States of America

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* Petitioners before this Court, all non-profit organizations, have no parent companies, subsidiaries, or affiliates, except Regular Common Carrier Conference, which is an affiliated conference of American Trucking Associations, Inc.

Allied Van Lines, Inc.
Allstate Carriers, Inc.
Carnaco Transport, Inc.
Ceco Transport, Inc.
Central Transport, Inc.
Central Transport Incorporated
Chemical Leaman Tank Lines, Inc.
Clearfield Transportation Company, Inc.
Coastal Tank Lines, Inc.
Contract Transportation Systems Company
Dash Transportation, Inc.
Distribution Service System, Inc.
DSI Transports, Inc.
Fresh Express, Inc.
Groendyke Transport, Inc.
International Transport, Inc.
Interstate Carriers Conference
Joseph Moving & Storage Company
J.R.S. Leasing Charter, Inc.
Kanata Carriers, Inc.
K.I.T. Motor Express, Inc.
L.R.C. Truck Line, Inc.
Market Support Services, Inc.
Miller Transporters, Inc.
Natural Transportation, Inc.
Oneida Columbus Express Company
Quad-City Spotting Service, Inc.
Quality Operations, Inc.
R.B.C. Transport, Inc.
R.C. Service, Inc.
Refrigerated International Cargo Haulers, Inc.
Riverside Transportation, Inc.
Schneider Transport, Inc.
T. M. Delivery Systems, Inc.
Trans-United, Inc.
Valdez Transfer, Inc.
Warehouse Freight, Inc.
Warren Transport, Inc.
Willard D. Van Zuiden Trucking, Inc.
Youngblood Transportation Systems, Inc.

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Central & Southern Motor Freight Tariff Association, Central States Motor Freight Bureau, Inc., The Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, Inc., National Motor Freight Traffic Association, Inc., New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc., Regular Common Carrier Conference, Rocky Mountain Motor Tariff Bureau, Inc., and Southern Motor Carrier Rate Conference petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered March 19, 1985, as slightly amended March 29, 1985, in Nos. 83-1581, 83-1740, 83-1761, and 83-1973, *Central & Southern Motor Freight Tariff Ass'n v. United States*, reported at 757 F.2d 301 (D.C. Cir. 1985). Petitioners are organizations

of over 3,000 motor common carriers which compete with motor contract carriers and are exposed to destructively-competitive rate practices because of the judgment.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered March 19, 1985, in Nos 83-1581, 83-1740, 83-1761, and 83-1973, is reproduced in *Appendix A*. The order of the Court of Appeals of March 29, 1985, slightly amending its opinion of March 19, is reproduced in *Appendix B*. The decisions of the Interstate Commerce Commission (ICC) before the Court of Appeals for review are reproduced as follows: The decision of the ICC in Ex Parte MC-165, *Exemption—Mtr. Contr. Car.—Tariff Filing Requirements*, of May 17, 1983, reported at 133 M.C.C. 150 (1983), is reproduced in *Appendix C*. The decision of the ICC in No. 38749 (Sub-No. 1), *et al., UTF Carriers, Inc.—Petition for Exemption from Tariff Filing Requirements*, of June 16 (served July 5), 1983 (not printed), is reproduced in *Appendix D*. The decision of the ICC in No. 38895, *et al., International Transport, Inc.—Petition for Exemption from Tariff Filing Requirements*, of June 16 (served July 5), 1983 (not printed), is reproduced in *Appendix E*. The notice (decision) of the ICC in Ex Parte No. MC-165 of August 29 (served September 7), 1983 (not printed), is reproduced in *Appendix F*.

JURISDICTION

Petitioners here petitioned the Court of Appeals for rehearing of its opinion and judgment of March 19, 1985, as amended. The decision of the Court of Appeals denying the petition for rehearing was entered on May 17, 1985, and is reproduced in *Appendix G*. This petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Involved in this proceeding and reproduced in whole or in part in *Appendix H* hereto, are: (a) the following sections of the Interstate Commerce Act, Title 49, U.S.C.: § 10101 (Transportation policy); § 10102 (Definitions); § 10702 (Authority for carriers to establish rates, classifications, rules, and practices; § 10704 (Authority and criteria: rates, classifications, rules, and practices prescribed by the ICC); § 10708 (Investigation and suspension of new non-rail carrier rates, classifications, rules, and practices); § 10741 (Prohibitions against discrimination by common carriers); § 10761 (Transportation prohibited without tariff); § 10762 (General tariff requirements); and § 10925 (Effective periods of certificates, permits, and licenses); and (b) the following sections of the Interstate Commerce Act prior to its 1978 recodification: 49 U.S.C. § 318 (Schedules of contract carriers by motor vehicle); 49 U.S.C., preceding §§ 1, 301, 901, and 1001 (National Transportation Policy).

STATEMENT OF THE CASE

This petition seeks review of an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered March 19, 1985, and slightly amended March 29, 1985 [Apps. A and B], which consolidated four petitions for review, in Nos. 83-1581, 83-1740, 83-1761, and 83-1973. In Nos. 83-1581 and 83-1740, the Court reviewed and affirmed an ICC decision in Ex Parte No. MC-165, *Exemption—Mtr. Contr. Car.—Tariff Filing Requirements*, of May 27, 1983, as reported at 133 M.C.C. 150 (1983) [App. C], promulgating a general rule permanently exempting all motor contract carriers of property from the tariff-filing requirements imposed upon these carriers by the Interstate Commerce Act (49 U.S.C. §§ 10702, 10761, and 10762). Because the Court of Appeals affirmed the ICC's decision to exempt *all* motor contract carriers of property from

their statutory tariff-filing requirements, the Court did not find it necessary to reach the issues raised by petitioners in Nos. 83-1761 and 83-1973, which challenged ICC exemptions of *individual* carriers.[1]

Federal Question

The Court of Appeals had jurisdiction to review the decisions of the ICC pursuant to 28 U.S.C. §§ 2321, 2342, and 2349.

REASONS FOR ALLOWING THE WRIT OF CERTIORAI

There are two important reasons why this Court should grant certiorari to review the opinion of the Court of Appeals.

First, this case involves an interpretation by the court below of the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*, which threatens both the ability of the ICC to administer the Act and the ability of motor common carriage to survive destructive competition from motor contract carriage. The blanket exemption from all statutory tariff-filing requirements allows motor contract carriers of property to keep their prices secret from competing motor common carriers, which must continue to file their tariffs publicly, 49 U.S.C. § 10762, and from the ICC itself and to engage in unfair and destruc-

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[1] In No. 83-1761, the Court of Appeals had before it two related ICC decisions, both served July 5, 1983, in No. 38749 (Sub-No. 1), *et al., UTF Carriers, Inc.—Petition for Exemption from Tariff Filing Requirements* (unprinted) [App. D], and in No. 38895, *et al., International Transport, Inc.—Petition for Exemption from Tariff Filing Requirements* (unprinted) [App. E], which consolidated and granted applications for exemption from the statutory tariff-filing requirements filed by 198 individual motor contract carriers. In No. 83-1973, the Court had before it a notice (decision) of the ICC, served September 7, 1983, in Ex Parte No. MC-165 and the 198 individual application proceedings [App. F], listing the standards the agency asserted would govern its disposition of individual applications for exemptions from the tariff-filing requirements.

tive pricing which threatens the ability of the common carriers to carry out their essential public service. The exemption thereby upsets the competitive harmony between motor common and motor contract carriers which Congress has scrupulously maintained since the inception of motor carrier regulation in 1935. The exemption renders meaningless the basic statutory requirement of tariff filing and prevents the ICC from enforcing the related statutory sections which are part of an interconnected regulatory framework designed by Congress to assure effective, fair, and nondestructive motor-common and motor-contract carriage.

Second, the Court of Appeals' interpretation of the Motor Carrier Act of 1980, 94 Stat. 793, on which its affirmation of the blanket exemption is bottomed, is inconsistent with the interpretation of the 1980 Act by this Court in *Interstate Commerce Comm'n v. American Trucking Ass'ns*, 104 S. Ct. 2458 (1984). The Court below interprets the 1980 Act as giving the ICC carte blanche to deregulate the motor carrier industry in the name of competition, a view inconsistent with both the more restrictive and balanced view of this Court and the view of Congress itself, which sought to promote competition in the motor carrier industry but left intact a framework of regulation which balanced competition with the need for health and stability in the industry.

A. The Decision of the Court of Appeals Threatens Effective Administration of the Interstate Commerce Act and Will Allow Destructive Competition by Motor Contract Carriers

The Interstate Commerce Act regulates two forms of for-hire motor carriage of property—common carriage and contract carriage (49 U.S.C. § 10102(13) and (14)). Motor common carriers hold themselves out to serve the

general public at reasonable rates and without discrimination. Motor contract carriers need only provide service to customers of their choice and are free to discriminate. The common carrier is liable as an insurer for the loss or injury of property transported and may limit that liability only in strict compliance with the Act. The contract carrier is liable only for such loss or damage as results from a failure to exercise ordinary care and may by contract limit its liability in any agreed manner without interference from the ICC.

From the inception of motor carrier regulation in 1935 through 1980 to today, Congress has had a single purpose in its regulation of motor contract carriage: to ensure that destructive contract carrier competition will not threaten a sound common carrier system, which the general shipping public relies upon for its transportation needs. Congress has included the public filing of tariffs by motor contract carriers as an essential element in a structure of statutory sections designed to forestall destructive competition.[2] Motor contract carriers, unlike motor common carriers, can lawfully discriminate among shippers.[3] Thus, Congress clearly intended that rate publication by motor contract carriers would protect competing motor common carriers.[4] The Court of Appeals has affirmed an ICC rule which, in a single stroke, ends tariff filing for all motor contract carriers of property for all time. Congress's statutory structure has been destroyed.

Sections 10702, 10761, and 10762 of Title 49, U.S.C., impose the following tariff-filing requirements upon a motor contract carrier:

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[2] *Contracts of Contract Carriers*, 1 M.C.C. 628 (1937).

[3] Discrimination among shippers by motor common carriers is specifically prohibited. 49 U.S.C. § 10741.

[4] H.R. Rep. No. 895, 85th Cong., 1st Sess., reprinted in 1957 U.S. Code Cong. & Ad. News 1406-07.

> § 10702(b)—the carrier must establish and file with the Commission actual and minimum rates and rules and practices relating to those rates;
>
> § 10761(a)—the carrier can provide transportation or service only if the rate therefore is contained in a tariff; and
>
> § 10762—the carrier must satisfy the general tariff requirements relating to publication, filing, inspection, notice, and amendment of the rate, including the requirement that rates be made effective on not less than 30 days' notice.

Each of these statutory sections allows the ICC to grant exemptive relief to motor contract carriers from those requirements under limited and specific circumstances. The exemption language in each section (49 U.S.C. §§ 10702(b), 10761(b), 10762(f)) is virtually identical:

> The Commission may grant relief from this section [or subsection] to contract carriers when relief is consistent with the public interest and the transportation policy of Section 10101 of this Title.

The tariff-filing requirements for motor contract carriers and the ICC's exemptive powers originated in section 218(a) of the Motor Carrier Act of 1935, 49 Stat. 561 (formerly codified at 49 U.S.C. § 318(a)) [App. 119a-122a].[5] Congress used section 218 to erect a precise, interconnected framework containing three elements necessary to assure adequate regulatory oversight of the rates of motor contract carriers: (1) Subsection 218(a) required motor contract carriers to file with the ICC tariffs containing their actual rates and charges. (2) Subsection 218(b) empowered the ICC to investigate a contract carrier's minimum rates and charges and to pre-

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[5] In 1978, Congress recodified the Interstate Commerce Act without substantive change, 92 Stat. 1372, assigning five-digit section numbers to Title 49. The tariff-filing and exemption provisions of section 218(a) (49 U.S.C. § 318(a)) were spread among new sections 10702, 10761, and 10762.

scribe minima if those filed by the contract carrier failed to meet the statutory criteria. Congress admonished the ICC in subsection 218(b) that the prescribed rate for a contract carrier "shall give no advantage or preference to any such [contract] carrier in competition with any common carrier by motor vehicle subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in the Act. . . ."[6] (3) Subsection 218(c) empowered the ICC to suspend and investigate proposed new or reduced contract-carrier rates believed to be unlawful (i.e., destructively competitive).[7]

The three provisions of section 218 are interdependent. Without the filing of tariffs, the ICC's power to suspend, investigate, and prescribe is a nullity. The rate-filing requirements and the Commission's power to suspend proposed tariffs are an integral part of a regulatory scheme designed to give the ICC a complete ratemaking charter and the only means for checking new rates that may subsequently prove to be below a reasonable mini-

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[6] Congress made consistency with the National Transportation Policy (formerly 49 U.S.C., preceding §§ 1, 301, 901 and 1001) [App. 122a] a criterion of exemptions from tariff filing in 1940 when that policy was promulgated. With respect to provisions of carrier rates and charges, the Policy stated:

> It is hereby declared to be the national transportation policy of the Congress . . . to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . .

[7] In 1957, Congress amended section 218(a) to require motor contract carriers to file with the ICC their actual, as well as their minimum, rates. The Congressional purpose was to assure "adequate and efficient common-carrier service by motor vehicle in the public interest." Congress recognized "the distinct competitive disadvantage" suffered by common carriers vis-a-vis contract carriers and sought through the amendment to establish "equality in rate publication." H.R. Rep. No. 895, 85th Cong., 1st Sess., reprinted in 1957 U.S. Code Cong. & Ad. News 1406-07.

mum level. See: *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 639-42 (1978); *United States* v. *Chesapeake & Ohio R. Co.*, 426 U.S. 500, 513 (1976).

The Motor Carrier Act of 1980, 94 Stat. 793, perpetuated the statutory structure designed to defend a strong system of common carriage against destructive pricing by contract carriers. The 1980 Act: (a) maintained the distinction between common and contract carriage; (b) retained recodified section 218 (49 U.S.C. §§ 10702, 10761, 10762) in its entirety;[8] and (c) preserved the National Transportation Policy's admonition "to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." 49 U.S.C. § 10101(a)(1)(D). While maintaining these provisions Congress added provisions which apply solely to motor carriers and are designed to achieve "competitive and efficient transportation services." 49 U.S.C. § 10101(a)(2). It is undoubtedly true that in the 1980 Act Congress sought to encourage greater competition among carriers for the freight business of shippers. It is equally clear that Congress did not intend to create a regulatory framework which would permit contract carriers to escape ICC minimum rate oversight and to have unfettered opportunity to charge destructive prices.

From 1935, when it was first empowered to exempt motor contract carriers from tariff filing requirements, to 1981, the ICC used the power only once, and did so only because the contract carrier service was "wholly noncompetitive with those of motor common carriers." *Armored Carrier Corp. Petition for Relief, Section 218(a)*, 303 I.C.C. 781, 788 (1958). In keeping with the Congressional mandate, the ICC construed the exemption in the light of the National Transportation Policy, finding that

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[8] Section 10762(a)(1) of Title 49 was slightly amended to relieve motor contract carriers transporting agriculturally-related products under certain conditions from filing their actual rates with the ICC.

the lack of possible destructive competition made the grant consistent with that policy.

In 1981 the ICC signaled a radical reversal of its 46-year-old policy. Despite the fact that the tariff-filing and tariff-exemption provisions of the Act remained unchanged, the ICC began to grant tariff-filing exemptions to motor contract carriers virtually for the asking. The ICC premised its new liberality solely on the thesis that the Motor Carrier Act of 1980 had created a regulatory climate in which tariff filing was *per se* an unwarranted burden.[9] The ICC's decisions of July 5, 1983, in Nos. 38749 (Sub No. 1), *et al.*, and 38895, *et al.* [Apps. D and E] are the final grants of 198 such individual applications.

Not content with rubber-stamping individual requests for tariff-filing exemptions, the ICC instituted a rulemaking proceeding in Ex Parte No. MC-165, culminating in its decision served May 27, 1983 [App. C], to grant a blanket exemption which, in one fell swoop, relieved all motor contract carriers of property from ever again filing tariffs. The ICC's rationale remained the alleged permissiveness of the 1980 Act.

In affirming the ICC's action, the Court of Appeals has read the Motor Carriers Act of 1980 as sanctioning a sweeping deregulation of the motor carrier industry with which the end of tariff filing for motor contract carriers of property is consistent. The Court acknowledges that the blanket exemption would have been out of place as of 1957 (App. 32a). But, according to the Court, Congress in 1980 fostered "an approach emphasizing market discipline, in contrast to public utility style ratemaking" (App. 17a-18a). To support its view, the Court seized upon a single prefatory phrase from the re-

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[9] See, e.g., No. 38649, *Gray Moving & Storage, Inc.—Petition from Tariff Filing Requirements*, 46 Fed. Reg. 36763 (July 15, 1981).

vised National Transportation Policy—"competitive and efficient transportation services"—as the measure of the ICC's power to exempt motor contract carriers from tariff filing (App. 18a, 32a, 41a).

The Court's reliance on the 1980 Act and its National Transportation Policy is faulty on four grounds. First, the Court fails to acknowledge the Congress's admonition that the 1980 Act "represents a middle ground between continuing the status quo, on the one hand, and total deregulation on the other hand." S. Rept. No. 96-641, 96th Cong., 2d Sess. 1-2 (1980). Second, the Court fails both to consider the National Transportation Policy as a whole, including the explicit prohibition against destructive competition, and to perceive the relationship between the Policy as a whole and the tariff-filing and minimum rate provisions of former section 218. Instead, the Court has isolated the tariff exemption provision and has matched it against its selected phrase from the Policy to reach a result which undoes the statutory scheme. Third, the Court has pushed the National Transportation Policy too far. The Fifth Circuit warned against too-broad reading of the Policy:

> Such a reading would make superfluous much of the rest of the Revised Interstate Commerce Act, with its detailed guidelines and delegations of authority, since the Commission could always claim that it was acting "to promote safe, adequate, economical, and efficient transportation" under section 10101 (a)(2). Such a reading would also make meaningless section 3 of the Motor Carrier Act of 1980, 49 U.S.C. § 10101 note, 94 Stat. 793 (1980), admonishing the Commission to stay within the "well-defined parameters . . . vested in it by the Interstate Commerce Act and other legislation enacted by Congress . . . ." Finally, construing the National Transportation Policy, which paraphrased says little more than "go forth and do good," as a congressional grant of rulemaking authority might well amount to an unconstitutional delegation of legislative authority.

Central Forwarding, Inc. v. I.C.C., 698 F.2d 1266, 1284 (5th Cir. 1983). Fourth, the Court notes that in the 1980 Act Congress eased the regulation of motor contract carriers in five specific areas,[10] which the Court perceives as a mandate to relieve motor contract carriers of other requirements, such as tariff filings (App. 18a-19a). The opposite is true. None of the five areas involve tariff filing. The specific changes which Congress did make show that Congress examined closely the question of statutory requirements for motor contract carriers and was unwilling to eliminate tariff filing. Furthermore, now that, through the changes which Congress did make, motor contract carriers can serve larger numbers of shippers and broader geographic areas, they are far better able to compete with motor common carriers, and thus oversight of their rates through public tariff filing becomes even more essential to prevent destructive competition.

In its support of deregulation of motor contract carrier tariff-filing, the Court has proposed three theories, all of which conflict with Congressional intent: First, the Court argues that the filing of contract-carrier tariffs is unnecessary to protect against destructive competition with common carriers because illegal contract-carrier rates can be exposed, complained of, and suspended, even if not filed with the ICC, just as the antitrust laws are enforced (App. 35a). There is no valid comparison between enforcement of the antitrust laws and exercise of the ICC's power to regulate contract carrier minimum rates. Under Section 4 of the Clayton Act, 14 U.S.C. § 15, private persons may obtain treble damages against competitors

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[10] (1) Removal of the prohibition against dual operations; (2) removal of the limit on the number of shippers a contract carrier may serve; (3) removal of restrictions on the nature of shippers, commodities, and geographic scope of motor contract carrier permits; (4) allowing motor contract carriers to serve freight forwarders; (5) allowing motor contract carriers to utilize trailer-on-flatcar service.

for violating the antitrust laws. For a motor common carrier injured by contract-carrier destructive competition, the only meaningful remedy at law is to seek ICC suspension and investigation of the unlawful rate before it becomes effective. No money damages can be awarded the common-carrier competitor for injuries suffered as a result of effective rates which the agency subsequently orders cancelled because they are competitively destructive. *McFadden Express, Inc.* v. *Adley Corp.*, 363 F.2d 546 (2d Cir., *cert. denied*), 385 U.S. 900 (1966). Thus, to limit its injury, the common carrier must know the contract-carrier rate as early as possible and can effectively gain this knowledge only from a publicly-filed tariff. It is obviously incorrect to say, as the Court does, that rate filing is not necessary to the ICC's exercise of its suspension power (App. 35a). What the ICC suspends is *proposed* rates,[11] and neither the ICC nor a competing common carrier has meaningful access to a proposed contract-carrier rate absent its public filing with the ICC.

Second, the Court proposes as a remedy to any threatened common carrier that it engage in contract carriage (App. 45a-46a). Petitioners are deeply disturbed that the Court would encourage common carriers to become contract carriers to escape destructive competition. Congress has recognized common carriage as an essential element of our transportation system. The conversion suggested by the Court might allow individual carriers to survive, but is clearly contrary to Congressional intent.[12]

Third, the Court goes so far as to imply that the ultimate solution to common-carrier concerns is to relieve them of their statutorily-imposed tariff-filing requirements:

> On the remote possibility that contract carriers enjoy any vestigial advantage, the utility-maximiz-

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[11] 49 U.S.C. § 10708(a)(1)(B), empowers the ICC *to suspend* a motor contract carrier rate when *filed* with the ICC.

[12] By contrast, Congress has empowered the ICC to curtail a motor contract carrier if its operations have become those of a common carrier. 49 U.S.C. § 10925(e)(1).

> ing course of action is the one freeing common carriers from the regulatory ties that bind rather than granting, to use the Commission's words, petitioners' "unappealing request for equality of disadvantage." Any residual competitive disadvantage is inherent in the common carrier mode of service.

(App. 46a-47a). This implication that Congressional action is called for highlights the Court's unwillingness to apply the statute as written and to recognize that its view of the need for tariff filing is different from that of Congress. Congress mandated tariff filing for both common and contract carriers. It is not within the Court's province to sanction the removal of this requirement.

B. The Court of Appeals' Reading of the Motor Carrier Act of 1980 Conflicts with this Court's Reading

Petitioners submit that the Court of Appeals' affirmaance of the ICC's blanket tariff-filing exemption for motor contract carriers of property is bottomed on an interpretation of the Motor Carrier Act of 1980 which is inconsistent with the interpretation of the 1980 Act by this Court in *Interstate Commerce Comm'n v. American Trucking Ass'ns*, 104 S. Ct. 2458 (1984). In *ICC v. ATA* this Court found that the ICC had the limited power to reject effective motor carrier tariffs issued in substantial violation of a rate-bureau agreement approved under 49 U.S.C. § 10706, even though the power was not expressly delegated to the ICC in the statute. At the same time, this Court refused the ICC's claim that the agency had the broad general power under 49 U.S.C. § 10706(e) to reject any effective tariff found to violate a statutory section or a promulgating regulation. *Id.*, at 2463. The Court found that to be legitimate the limited discretionary power of the ICC to modify an express statutory remedy must satisfy two cirteria: "first, the power must further a specific statutory mandate of the Commission and second, the exercise of power must be directly and closely tied to that mandate." *Id.*, at 2464.

The blanket tariff-filing exemption granted to all motor contract carriers of property by the ICC fails these tests. First, it furthers no specific statutory mandate. There is no hint in Title 49, or elsewhere, that Congress wanted this requirement terminated on an industry-wide basis; in fact, as shown, the blanket exemption destroys the interlocking statutory framework designed to insure that motor contract carriage does not become destructively competitive with motor common carriage. Second, the ICC's exercise of power is not directly and closely tied to a statutory mandate. It is, instead, a grossly-exaggerated expansion of the limited exemptive power given to the ICC in sections 10702(b), 10761(b), and 10762(f). In its *ICC v. ATA* decision, this Court held that "the Commission's interpretation is unsupported by a natural reading of the [statutory] provisions and inconsistent with the remedial structure established by Congress." *Id.*, at 2464. The ICC's reading of its exemptive powers is equally faulty.

Petitioners note also that this Court's concern in *ICC v. ATA* over approving even the ICC's limited remedial power was lessened by the agency's continuing oversight of rate-bureau agreements and "the procedural safeguards of full hearings and judicial review that are built into the Commission's proposal." *Id.*, at 2468. The ICC's continuing oversight and the potential of judicial review of motor contract carrier tariffs are practically eliminated by the blanket exemption from tariff filing. Motor common carriers and the shipping public no longer have a meaningful opportunity to learn of unlawful contract carrier rates and thus would be frustrated in their efforts to bring the rates before the ICC or the courts.

Four members of this Court dissented from the majority view in *ICC v. ATA*. Petitioners here suggest that the majority and minority agree that whatever power the ICC possesses must be rooted in specific statutory provisions. The minority in *ICC v. ATA* found that the Motor

Carrier Act of 1980 and its legislative history did not contain the mandate for the limited implied power approved by the majority. The minority states, "The 1980 Congress shared the Commission's desire to increase competition in the motor carrier industry, but it rejected the Commission's attempts to create that competition on its own initiative." 104 S. Ct., at 2470. The minority cited Congress's command to the ICC to stay within the specific bounds of the statute, *Id.*, and noted that the remedial power extended to the ICC by the majority had been rejected by Congress when it declined to place the remedy in the 1980 Act. *Id.*, at 2471. The blanket tariff-filing exemption adopted by the ICC and approved by the Court of Appeals likewise finds no home in the 1980 Act, where Congress carefully preserved all the statutory provisions which give the ICC authority to supervise the rates of motor contract carriers.

The minority in *ICC v. ATA* states:

> . . . [T]he 1980 Act was equally intended to promote certainty in industry pricing and to protect carriers' reliance on filed tariffs. In the motor carrier industry, goods are shipped, revenues collected, and business plans formulated in reliance on these tariffs. In 1980, Congress apparently continued to believe that effective national transportation policy requires that carriers be able to rely on their filed rates. . . .

Id. at 2472. The minority had before it a case involving motor common carrier rates, but petitioners submit that the minority's emphasis on reliance on filed tariffs is equally applicable to motor contract carrier rates. The minority concludes the ICC should look to Congress for its claimed power but that the majority has rewritten the law. These conclusions sum up the errors of the Court of Appeals in affirming the ICC's blanket exemption to motor contract carriers.

CONCLUSION

The Motor Carrier Act of 1980 does not sanction the permanent exemption of all motor contract carriers from the specific tariff-filing requirements of 49 U.S.C. §§ 10702, 10761, and 10762. Congress never intended, before or after 1980, that the limited exemptive power extended to the ICC in those statutory sections could be so broadened that it expunged the requirements themselves. The Court of Appeals has read a deregulatory sweep into the 1980 Act which is not supported by this Court's reading of the Act in the *ICC v. ATA* case. The judgment of the Court of Appeals should be reviewed to make clear Congressional intent and to preserve effective administration of the Interstate Commerce Act.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATE: August 15, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 83-1581, 83-1740, 83-1761
and 83-1973

CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents,

REGULAR COMMON CARRIER CONFERENCE, INC., AMERICAN TRUCKING ASSOCIATIONS, INC., EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., INTERSTATE CARRIERS CONFERENCE, GROENDYKE TRANSPORT, INC.,
Intervenors.

HOUSEHOLD GOODS CARRIERS' BUREAU, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

GROENDYKE TRANSPORT, INC.,
Intervenor.

THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., and the REGULAR COMMON CARRIER CONFERENCE, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

CHEMICAL LEAMAN TANK LINES, INC., *et al.*, INTERNATIONAL TRANSPORT, INC., REFRIGERATED INTERNATIONAL CARGO HAULERS, INC., GROENDYKE TRANSPORT, INC., YOUNGBLOOD TRANSPORTATION SYSTEMS, INC., COASTAL TANK LINES, INC., CENTRAL TRANSPORT, INC., FRESH EXPRESS, INC., *et al.*, ALLSTATE CARRIERS, INC., *et al.*, SCHNEIDER TRANSPORT, INC., *et al.*, DSI TRANSPORTS, INC., CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INC., *et al.*, J.R.S. LEASING CHARTER, INC., L.R.C. TRUCK LINES, INC., CARNACO TRANSPORT, INC., RIVERSIDE TRANSPORTATION, INC., QUALITY OPERATIONS, INC., R.B.C. TRANSPORTATION, INC., SOUTHERN MOTOR CARRIER RATE CONFERENCE, CLEARFIELD TRANSPORTATION COMPANY, INC., MILLER TRANSPORTERS, INC., ALLIED VAN LINES, INC.,

Intervenors.

THE EASTERN CENTRAL MOTOR CARRIERS
ASSOCIATION, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

Argued Feb. 9, 1984

Decided March 19, 1985

As Amended March 29, 1985

Petitions for Review of Orders of the
Interstate Commerce Commission

Donald E. Cross, Thomas Auchincloss and Elliott Bunce, Washington, D.C., with whom Bryce Rea, Jr., Washington, D.C., John W. McFadden, Jr., Arlington, Va., John C. Bradley, J. Curtis Bradley, III, Kim D. Mann, Great Falls, Va., and Kevin M. Williams, Washington, D.C., were on the joint brief, for petitioners/intervenors in Nos. 83-1581, 83-1740, 83-1761 and 83-1973. Patrick McEligot, William Kenworthy, F.H. Lynch, Jr., William W. Pugh, Robert A. Wilson and Leo C. Franey, Washington, D.C., entered appearances for petitioners/intervenors.

Craig M. Keats, Atty. I.C.C., Washington, D.C., with whom John Broadley, General Counsel, and Ellen D. Hanson, Associate General Counsel, Interstate Commerce Commission, and Robert B. Nicholson and John P. Fonte, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

Charles H. White, Jr., Washington, D.C., for intervenor Refrigerated International Cargo Haulers, Inc., in No. 83-1761.

Alvin J. Meiklejohn, Jr., Denver, Colo., was on the brief for intervenor Groendyke Transport, Inc. in Nos. 83-1581, 83-1740, 83-1761 and 83-1973.

Edward J. Kiley, William H. Shawn, Alan J. Thiemann and Robert R. Harris, Washington, D.C., were on the

brief for intervenors Chemical Leaman Tank Lines, Inc., et al. in No. 83-1761. Robert R. Harris entered an appearance for intervenor Allied Van Lines, Inc. in No. 83-1761.

Thomas A. Callaghan, Jr. and Frederic D. Houghteling, Washington, D.C., were on the brief for intervenor Interstate Carriers Conference in No. 83-1581.

William H. Borghesani, Jr., Michael F. Morrone and Timothy Brown, Washington, D.C., were on the brief for intervenors Carnaco Transport, Inc., et al. in No. 83-1761.

Daniel C. Sullivan and Vyta P. Ambutus, Chicago, Ill., were on the brief for intervenors Schneider Transport, Inc., et al. in No. 83-1761.

E. Stephen Heisley and Lester R. Gutman, Washington, D.C., were on the brief for intervenors Central Transport, et al. in No. 83-1761.

Richard B. Felder, Washington, D.C., was on the brief for intervenor International Transport in No. 83-1761.

Marshall Kragen, Washington, D.C., was on the brief for intervenors Allstate Carriers, et al. in No. 83-1761.

Harold D. Miller, Jr., Jackson, Miss., was on the brief for Miller Transporters in No. 83-1761.

Nelson J. Cooney and Kenneth E. Seigal, Washington, D.C., were on the brief for intervenor American Trucking Associations, Inc. in No. 83-1581.

Charles Ephraim and James F. Flint, Washington, D.C., entered appearances for intervenor Youngblood Trucklines in No. 83-1761.

Leonard R. Kofkin, Chicago, Ill., entered an appearance for intervenor Central Transport, Inc. in No. 83-1761.

Ronald N. Cobert and Robert L. Cope, Washington, D.C., entered appearances for intervenor Fresh Express, Inc., et al. in No. 83-1761.

Joseph Winter, Atlanta, Ga., entered an appearance for intervenor J.R.S. Leasing Charter, Inc. in No. 83-1761.

Mark J. Andrews, Washington, D.C., entered an appearance for intervenor Clearfield Transportation Company, Inc. in No. 83-1761.

Kevin M. Williams, Arlington, Va., entered an appearance for intervenor Regular Common Carrier Conference, Inc. in No. 83-1581.

Before WRIGHT and SCALIA, Circuit Judges, and WILKEY,* Senior Circuit Judge.

Opinion PER CURIAM.

PER CURIAM:

This appeal consolidates four petitions to set aside, in whole or in part, orders of the Interstate Commerce Commission exempting motor contract carriers of property from the Motor Carrier Act's requirements to file tariffs. We uphold the Commission's statutory authority to relieve motor contract carriers from the tariff-filing requirements. We also find reasonable the Commission's use of that authority to exempt all such carriers of property. Because we affirm the Commission's decision to exempt *all* such carriers, we do not separately examine the Commission's orders relating to exemptions of *individual* carriers.

I. Facts

Under the Motor Carrier Act as amended,[1] motor contract carriers are required to file tariffs stating their actual and minimum rates.[2] (As defined by the Act, motor contract carriers of property provide "motor vehicle transportation of property for compensation under continuing

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* Senior Circuit Judge Wilkey did not participate in the decision of this case.

[1] *See* 49 U.S.C. §§ 10101-11917 (1982).

[2] *See id.* §§ 10702(b), 10761(a), 10762(a)(1).

agreements" to one or more shippers, by dedicating equipment or by meeting the shippers' distinct needs.[3] Motor common carriers, in contrast, hold themselves "out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." [4])

The Motor Carrier Act also authorizes the Interstate Commerce Commission to exempt contract (but not common) carriers from the tariff-filing requirements. The exemption available to contract carriers appears in title 49 of the *United States Code* as follows:

> The Commission may grant relief from . . . [this section or subsection to contract carriers] when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this section [or subsection] on application of a contract carrier or group of contract carriers. . . .[5]

Although Congress has amended the original Motor Carrier Act several times since 1935 (as will be discussed in more detail below), the tariff-filing requirements and the Commission's accompanying exemption power have remained intact.

In order to keep separate the four petitions consolidated in this action, we present the factual material under the case caption to which it relates.

A. *Central & Southern Motor Freight Tariff Association, Inc. v. United States, No. 83-1581, and Household Goods Carriers' Bureau, Inc. v. United States, No. 83-1740*

In 1981, following passage of the Motor Carriers Act of 1980, the Interstate Commerce Commission demon-

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[3] *Id.* § 10102(14)(B).

[4] *Id.* § 10102(13).

[5] *Id.* §§ 10702(b), 10761(b), 10762(f).

strated a marked change in its attitude toward exemption of motor contract carriers from the tariff-filing requirements. The Commission had addressed the scope of its exemption authority only three times between 1935 and 1980.[6] In the following three years, however, it exercised its long-dormant power more often than it had in the first forty-five years of that provision's existence.[7]

As the pace of tariff-filing exemptions quickened, the demands for exemptions extended to broader, class-wide relief. In June 1982 the staff of the Federal Trade Com-

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[6] *See Petition of Armored Carrier Corp. for Relief from the Provisions of Section 218(a) of the Interstate Commerce Act*, 303 I.C.C. 781 (1958); *Transportation of United States Gov't Freight by Motor Vehicle*, 301 I.C.C. 551 (1957); *Baggett Transp. Co.—Petition for Exemption—Transp. for United States Gov't*, 61 M.C.C. 771 (1953).

[7] *See, e.g., Johnsrud Transp., Inc.—Petition for Exemption from Tariff Filing Requirements* (served 20 May 1983) (No. 38,959), *reprinted in* Joint Deferred App. (JDA) at 433; *Riverside Transp., Inc.—Petition for Exemption from Tariff Filing Requirements* (served 20 May 1983) (No. 38,909), *reprinted in* JDA at 393; *Batt Trucking—Petition for Exemption from Tariff Filing Requirements* (served 12 May 1983) (No. 38,990-7), *reprinted in* JDA at 496; *Aero Mayflower Transit Co., Inc.—Petition for Exemption from Tariff Filing Requirements* (served 6 May 1983) (No. 38,879), *reprinted in* JDA at 780; *Allied Van Lines, Inc.—Petition for Exemption from Tariff Filing Requirements* (served 29 Apr. 1983) (No. 38,998), *reprinted in* JDA at 775; *Three Way Corp., Petition for Exemption from Tariff Filing Requirements* (served 13 Jan. 1983, modified 30 Mar. 1983) (No. 38,828), *reprinted in* JDA at 769, 773; *Ward Transport, Inc.—Petition for Exemption from Tariff Filing Requirements* (served 7 Jan. 1983) (No. 38-856), *reprinted in* JDA at 765; *UTF Carriers, Inc.—Petition for Exemption from Tariff Filing Requirements under 49 U.S.C. 10761(b)* (served 12 Oct. 1982) (No. 38,749), *reprinted in* JDA at 759; *Gray Moving & Storage, Inc., Petition for Exemption from Tariff Filing Requirements* (served 29 Apr. 1982) (No. 38,704), *reprinted in* JDA at 757; *Gray Moving & Storage, Inc., Petition from Tariff Filing Requirements* (served 5 Nov. 1981) (No. 38,703), *reprinted in* Joint Brief of Intervenors in Support of Respondents, at 43 app. A, No. 83-1761.

mission asked the Commission to institute a rulemaking proceeding to consider eliminating the tariff-filing requirements for all motor contract carriers.[8] On 29 July 1982 the Contract Carrier Conference of the American Trucking Association (now the Interstate Carriers Conference) applied for the same class-wide relief.[9]

The Commission responded by initiating a legislative-type rulemaking proceeding in a notice issued 12 December 1982.[10] In that notice the Commission tentatively decided to promulgate an exemption for *all* motor contract carriers, both of property and of persons.[11]

After considering initial and reply comments on its analysis in January and February of 1983, the agency served a final decision on 27 May 1983.[12] That decision exempted motor contract carriers *of property* from filing rate schedules with the Commission.[13] Petitioners and intervening petitioners in No. 83-1581 challenged the statutory authority and record support for the Commission's broad exemption by filing a petition in this court on 3 June 1983.[14] The Household Goods Carriers' Bureau filed a separate petition, denominated No. 83-1740, to remove

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[8] *See* JDA at 1.

[9] *See id.* at 40.

[10] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 47 Fed.Reg. 57,303 (1982) (notice of proposed rulemaking). Although the Commission found that it could begin a proceeding neither on its own initiative nor at the request of the FTC, it concluded that the Contract Carrier Conference was qualified to apply for class-wide relief. *See id.* at 57,304.

[11] *See id.* at 57,303.

[12] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983) (Ex Parte No. MC-165).

[13] *See id.* at 152.

[14] *See Central & Southern Motor Freight Tariff Ass'n, Inc. v. United States*, No. 83-1581 (D.C.Cir. filed 3 June 1983).

carriage of household goods from the broad exemption even if the Commission's decision is otherwise upheld.[15]

B. *Eastern Central Motor Carriers Association, Inc. v. United States, No. 83-1761*

The Commission's new attitude toward granting exemptions from the tariff-filing requirements did not go unnoticed. After the spring of 1982, when the agency granted a final exemption to UTF Carriers, Inc.,[16] the Commission was inundated with hundreds of exemption applications from individual motor contract carriers. In order to cope with the flood of applications, the Commission streamlined its decision-making process by abbreviating the notice given, by shortening the pertinent comment period, and by "batching" the previously separate notices and exemptions of individual carriers.[17]

It was also during this period that the Commission began to issue "provisional" exemptions—exemptions which were effective unless and until the Commission received adverse comment indicating that exemption was not warranted.[18]

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[15] *See Household Goods Carriers' Bureau, Inc. v. United States*, No. 83-1740 (D.C.Cir. filed 8 July 1983).

[16] *See UTF Carriers, Inc.—Petition for Exemption from Tariff Filing Requirements under 49 U.S.C. 10761(b)* (served 12 Oct. 1982) (No. 38,749), *reprinted in* JDA at 759.

[17] *See* Joint Brief for Petitioners and Intervening Petitioners at 11, Nos. 83-1581, 83-1761 & 83-1973.

[18] *See, e.g., Motor Carriers; UTF Carriers, Inc.—Petition for Exemption from Filing Requirements*, 48 Fed.Reg. 22,376, 22,376 (1983) (No. 38,749 (Sub-No. 1)) (consolidating 5 petitions); *International Transport, Inc., et al.—Petition for Exemption from Tariff Filing Requirements*, 47 Fed.Reg. 55,537, 55,538 (1982) (No. 38,895) (consolidating 23 petitions); *Motor Carriers; RTC Trans., Inc.; Decision on Petition for Relief from Tariff Filing Requirements*, 47 Fed.Reg. 49,100, 49,100 (1982) (No. 38,887); *Gray Moving & Storage Inc., Petition for Exemption from Tariff Filing Requirements*, 46 Fed.Reg. 36,763, 36,764 (1981) (No. 38,649).

On 12 April 1983, two petitioners in this proceeding, the Eastern Central Motor Carrier Association, Inc. and the Regular Common Carriers Conference, objected to "provisional exemptions" on the ground that the Commission could (and would) leave the provisional exemptions in effect indefinitely simply by failing to render a final decision. The so-called "provisional" exemptions, in petitioners' eyes, were final exemptions in disguise. Petitioners accordingly sought mandamus in this court to stop the practice.[19]

In response to petitioners' mandamus request, the Commission promised to issue no further provisional exemptions in contested cases until after a decision was rendered, and to issue final decisions within twenty-one days in all pending contested cases.[20] In accordance with this court's mandate and the Commission's undertaking, the Commission on 5 July served two decisions consolidating and granting exemptions filed by 198 individual motor contract carriers.[21] Petitioners and intervening petitioners sought review in this court on 14 July 1983.[22]

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[19] *See In re: Eastern Central Motor Carriers Association, Inc. and Regular Common Carrier Conference, Inc.—Petition for Writ of Mandamus and Writ of Prohibition*, No. 83-1386 (D.C.Cir. filed 12 Apr. 1983).

[20] *See In re: Eastern Central Motor Carriers Association, Inc. and Regular Common Carrier Conference, Inc.—Petition for Writ of Mandamus and Writ of Prohibition*, No. 83-1386 (D.C.Cir. 10 June 1983).

[21] *See UTF Carriers, Inc.—Petition for Exemption from Tariff Filing Requirements* (served 5 July 1983) (No. 38,749 (Sub-No. 1)) (addressing cases not yet beyond the provisional exemption stage), *reprinted in* JDA at 298; *International Transport, Inc.—Petition for Exemption from Tariff Filing Requirements* (served 5 July 1983) (No. 38,895) (addressing cases in which requests for administrative reconsideration of final grants of relief had been received); *reprinted in* JDA at 733.

[22] *See Eastern Central Motor Carriers Ass'n, Inc. v. United States*, No. 83-1761 (D.C.Cir. filed 14 July 1983).

C. *Eastern Central Motor Carriers Association, Inc. v. United States, No. 83-1973*

Less than a week later, on 20 July 1983, this court stayed the effectiveness of the Commission decisions in both the rulemaking and the individual proceedings and consolidated the three petitions.[23] On 29 July we denied respondents' and intervenors' motions for reconsideration, rehearing, and vacation of the stays and offered clarification of our order of 20 July.[24] We emphasized that our stay did not interfere with the agency's ongoing disposition of individual exemption applications pending before it:

> Individual exemption proceedings have not been stayed; we do no more than return each to the status quo existing prior to the July 5 orders. Rather, what has been stayed is the Commission's summary disposition of all pending individual exemption proceedings simply by reference to the findings and general conclusions made in issuing the prior industry-wide tariff exemption in *Ex Parte MC-165*. . . . Each such application must, pursuant to past practice, be examined on its own merits.[25]

On 29 August the Commission decided that it should issue standards governing disposition of pending individual applications, because our stay prevented the agency from granting exemptions by reference to its broad exemption. On 7 September 1983 the Commission served a notice summarizing this court's actions and listing such

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[23] We granted an administrative stay on 30 June 1983 to give ourselves the opportunity to consider petitioners' request to stay the broad exemption, which was scheduled to go into effect on that date.

[24] *Central & Southern Motor Freight Tariff Ass'n, Inc. v. United States*, Nos. 83-1581 & 83-1761 (D.C.Cir. 29 July 1983).

[25] *See id.* at 2.

standards.[26] Petitioners and intervening petitioners sought review and a stay on 12 and 13 September respectively.[27] On 14 September 1983 we added the petition in No. 83-1973 to this consolidated appeal.[28] On 23 September we denied petitioners' request for a stay.[29]

We lifted our order staying the Commission's broad exemption and the 198 individual exemptions on our own motion on 28 September.[30] We reasoned that petitioners had not demonstrated the irreparable harm required for a stay, because "revenues and customers lost to competition which can be regained through competition are not irreparable," and because "[p]etitioners may seek to eliminate the alleged competitive advantage given to the contract carriers simply by engaging in the contract carrier trade themselves." [31]

D. *Preview of Analysis*

Because we have, by vacating our stay, allowed the Commission's broad exemption to go into effect, petitioners' challenge of the criteria governing disposition of

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[26] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 48 Fed.Reg. 40,520 (1983) (Ex Parte No. MC-165) (rule related notice; notice of court action).

[27] *See Eastern Central Motor Carriers Ass'n, Inc. v. United States*, No. 83-1973 (D.C.Cir. filed 12 & 13 Sept. 1983).

[28] *See Eastern Central Motor Carriers Ass'n, Inc. v. United States*, No. 83-1973 (D.C.Cir. 14 Sept. 1983).

[29] *See Eastern Central Motor Carriers Ass'n, Inc. v. United States*, No. 83-1973 (D.C.Cir. 23 Sept. 1983).

[30] *See Central & Southern Motor Freight Tariff Ass'n, Inc. v. United States*, Nos. 83-1581, 83-1740 & 83-1973 (D.C.Cir. 28 Sept. 1983).

[31] *See id.* Petitioners' requests for further reconsideration were denied.

individual petitions (the 7 September 1983 order) is moot.[32]

Moreover, even if this court's stay remained in effect, the challenges to the individual exemptions are moot by virtue of our decision herein to affirm the Commission's broad exemption. We therefore do not set forth our views on the petitions challenging exemptions granted to individual motor contract carriers.

To deal clearly with the myriad petitioners, respondents, and intervenors and the plethora of arguments they raise, we adopt two conventions. First, rather than cite and state each brief's unique shading of a particular argument, we have collected all the contentions and reordered and responded to them in the analysis that follows. In addition, for the sake of convenience we henceforth refer to all petitioners and intervening petitioners collectively as "petitioners" and all respondents and intervening respondents collectively as "respondents." Before embarking on our analysis, a brief recitation of the history of motor carrier regulation is in order.

II. A Precis of the History of Motor Carrier Regulation

Motor carrier regulation has evolved from a regime designed to protect common carriers against competition from contract carriers to one in which common and contract carriers are to compete with each other and with other modes of transportation as well.

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[32] The parties recognize this fact as well. *See* Joint Brief for the Interstate Commerce Commission and the United States of America at 50, Nos. 83-1581, 83-1740, 83-1761 & 83-1973; Brief for Intervening Respondent, International Transport, Inc. at 30, Nos. 83-1581, 83-1761 & 83-1973; Joint Reply Brief for Petitioners and Intervening Petitioners at 30, Nos. 83-1581, 83-1761 & 83-1973.

Congress designed the Motor Carrier Act of 1935,[33] in large part, to prevent depression-squeezed contract carriers from encroaching on the domain of common carriers.[34] Congress employed several devices to this end. Among other restrictions, the 1935 Act defined contract carriage to be a long-term or specialized service and generally barred "dual operations" (thereby preventing a carrier from serving shippers of both contract and common carriage), unless the Interstate Commerce Commission ordered otherwise "for good cause shown."[35] The Commission imposed further requirements, specifying that contracts be in writing, of continuing duration, and of a prescribed form.[36] Additionally, Congress required contract carriers to file a schedule setting out minimum rates below which they could not charge.[37] Notwithstanding its goal of insulating common carriers from the depredations of contract carriers, Congress authorized the Commission to exempt contract carriers from the tariff-filing requirements.[38]

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[33] Motor Carrier Act, 1935, ch. 498, 49 Stat. 543 (codified as amended and with some differences in languag but without substantive change at scattered sections of 49 U.S.C.). The Motor Carrier Act of 1935 was codified as title II of the Transportation Act of 1940. *See* Transportation Act of 1940, ch. 722, 54 Stat. 898, 929-52.

[34] *See Contracts of Contract Carriers*, 1 M.C.C. 628, 631 (1937), *modified, Contracts of Contract Carriers*, 11 M.C.C. 693 (1938), *modified sub nom . In re Filing of Contracts by Contract Carriers by Motor Vehicle*, 41 M.C.C. 527 (1942).

[35] *See Motor Carrier Act*, 1935, §§ 203(15), 210, 49 Stat. 543, 544, 554 (repealed 1980).

[36] *See Contracts of Contract Carriers*, 1 M.C.C. at 632.

[37] *See* Motor Carrier Act, 1935, § 218(a), 49 Stat. at 561 (codified as amended and with some differences in language but without substantive change at 49 U.S.C. §§ 10702(b), 10761(a), 10762(a)(1) (1982)).

[38] *See id.* § 218(a), 49 Stat. at 562 (codified with some differences in language but without substantive change at 49 U.S.C. §§ 10702 (b), 10761(b), 10762(b).

In 1957 Congress strengthened the protections of common carriers found in the 1935 Act.[39] The objective, according to the responsible committee, was "the promotion and protection of adequate and efficient common-carrier service by motor vehicle in the public interest. The regulation of contract carriers was designed with that end, among others, in view.[40] With respect to tariff filing in particular, Congress required contract carriers to file their actual rates in addition to their minimum rates.[41] The motivating idea was that of "open pricing," under which common carriers were to enjoy "equality in rate publication" [42] to prevent diversion of traffic to contract carriers and to ensure uniform and predictable rates. "Open pricing" was intended to remedy the disadvantage of common carriers who "are unable to determine whether the minimum rate filed is the rate charged to all shippers for the same service." [43] The many restrictions imposed on the operations of contract carriers makes clear that the legislative intent was *not* to put contract and common carriers on the same competitive plane and let the better carrier win. Rather, the aim was unabashed protection of common carriers.[44] Notwithstanding this goal, Con-

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[39] *See* Act of 13 Aug. 1957, Pub.L. No. 85-124, 71 Stat. 343 (codified as amended at 49 U.S.C. §§ 10702, 10761, 10762).

[40] H.R.REP. No. 895, 85th Cong., 1st Sess. 2, *reprinted in* 1957 U.S. CODE CONG. & AD.NEWS 1406, 1407; *accord,* S.REP. No. 335, 85th Cong., 1st Sess. 2 (1957).

[41] *See* Act of 13 Aug. 1957, Pub.L. No. 85-124, 71 Stat. 343, 343 (codified at 49 U.S.C. §§ 10702(b), 10761(a), 10762(a)(1) (1982)).

[42] H.R.REP. No. 895, 85th Cong., 1st Sess. 2, *reprinted in* 1957 U.S.CODE CONG. & AD.NEWS 1406, 1407.

[43] *Id., reprinted in* 1957 U.S.CODE CONG. & AD.NEWS at 1407; *see also id.* ("[I]t is more difficult for common carriers to compete since they have no way of knowing the actual rates charged by their contract carrier competitors."), *reprinted in* 1957 U.S.CODE CONG. & AD.NEWS at 1407.

[44] The disparate regulatory treatment of contract and common carriers is perhaps best illustrated by example. In many instances

gress retained the Commission's discretionary authority to exempt contract carriers from the tariff-filing requirements.

Beginning in the 1970s, the Commission began unraveling the ties that bound together this pervasive regulatory framework. In serial fashion the agency relaxed entry

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the amended Motor Carrier Act placed contract carriers at a distinct disadvantage. For example, common carriers could typically initiate new service to shippers without delay, while contract carriers had to apply for a permit to serve each new customer. *See* 49 U.S.C. § 10761(a) (1982).

Common carriers were not completely sacrosanct, however. While the rates of contract carriers could be attacked and set aside only for being unreasonably low (and thus harmful to competing carriers), common carrier rates could be attacked and set aside for being unreasonably high (and thus harmful to shippers). *See id.* § 10708(a)(1). In addition, contract carriers could raise their rates without prior warning, while common carriers could increase their rates only upon thirty days advance notice. *See id.* § 10762 (c)(1)-(2). Furthermore, common carrier rates could be set aside for discriminating unjustly between shippers; contract carrier rates could not. *See id.* § 10741.

Petitioners assert that "courts have recognized the importance Congress placed on achieving competitive equality for common carriers through the 1957 amendment." Joint Brief for Petitioners and Intervening Petitioners at 27, Nos. 83-1581, 83-1761 & 83-1973. Although the cases cited by petitioners prove that the 1957 legislation was designed to protect common carriers from contract carrier competition, *see Locust Cartage Co. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334, 343 (1st Cir.) (published rates prevent "destructive competition"), *cert. denied*, 400 U.S. 964, 91 S.Ct. 365, 27 L.Ed.2d 383 (1970); *Bowser & Campbell v. Knox Glass, Inc.*, 390 F.2d 193, 195-96 (3d Cir.), *cert. denied*, 392 U.S. 907, 88 S.Ct. 2061, 20 L.Ed.2d 1365 (1968); *but see A & F Trucking Corp. v. Liggett Drug Co.*, 253 F.Supp. 699, 702 (S.D.N.Y. 1966) (mistakenly reading the House and Senate Committee reports as mandating "equaliz[ation of] competitive opportunities"), they do *not* prove that "competitive equality" lies at the heart of the 1957 amendment. The numerous restrictions imposed on contract carriers besides the tariff-filing requirements are inconsistent with petitioners' "competitive equality" characterization.

standards,[45] awarded liberal grants of operating authority to contract carriers,[46] authorized the simultaneous holding of contract and common carrier authority,[47] and revoked its earlier presumption that a contract carrier could not serve more than eight shippers without becoming a common carrier.[48]

The Motor Carrier Act of 1980 largely followed the Commission's lead. After more than eighteen months of study,[49] Congress concluded that the existing "statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980's." [50] Congress concluded that the Commission had gone too far in

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[45] *See Liberty Trucking Co., Extension—General Commodities*, 130 M.C.C. 243, 246-47 (1978), *aff'd*, 131 M.C.C. 573, 574-75 (1979), *aff'd sub nom. Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467, 475-79 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981); *see also Policy Statement on Motor Carrier Regulation*, 44 Fed.Reg. 60,296 (1979) (Ex Parte No. MC-121) (reducing importance of adequacy of existing service), *aff'd sub nom. Assure Competitive Transp., Inc. v. United States*, 635 F.2d 1301, 1304-07 (7th Cir. 1980).

[46] *See, e.g., Cargo Contract Carrier Corp. Extension—Bananas*, 126 M.C.C. 874, 880 (1977).

[47] *See Dual Operations of Motor Carriers*, 43 Fed.Reg. 14,664 (1978) (Ex Parte No. MC-55 (Sub-No. 27)), *aff'd sub nom. American Trucking Ass'ns, Inc. v. United States*, 602 F.2d 444, 449-52 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979).

[48] *See Policy Statement Regarding the "Rule of Eight" in Contract Carrier Applications*, 44 Fed.Reg. 2470 (1979) (Ex Parte No. MC-119), *petition for review dismissed as not ripe sub nom. Regular Common Carrier Conference v. United States*, 628 F.2d 248, 251-52 (D.C.Cir. 1980).

[49] *See* H.R.REP. No. 1069, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2283, 2283.

[50] Motor Carrier Act of 1980, Pub.L. No. 96-296, § 3(a), 94 Stat. 793, 793 (codified at 49 U.S.C. § 1010 note (1982)).

attempting to establish "master licensing," under which the Commission had planned to make prospective findings of a public need for certain types of expanded services.[51] But in most other respects the new law codified the Commission's decisions and adopted the agency's approach to motor carrier regulation—an approach emphasizing market discipline, in contrast to public utility-style ratemaking, as the principal regulator of motor carriers.[52]

One of the objectives of the new Act was "remov[al of] many of the obstacles that have kept motor contract carriers from realizing their full potential."[53] To accomplish this goal, Congress amended the national transportation policy "to promote competitive and efficient transportation services."[54]

Specifically, the 1980 Act made contract carriage more attractive to motor carriers by (1) removing the prohibition against dual operations (thereby allowing the same carrier to operate as both a contract and a common carrier),[55] (2) removing the limit on the number of shippers

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[51] *See* H.R.REP. No. 1069, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2283, 2295.

[52] *See* Motor Carrier Act of 1980, Pub.L. No. 96-296, § 2, 94 Stat. 793, 793 (codified at 49 U.S.C. § 10101 note (1982)) ("This Act is part of the continuing effort by Congress to reduce unnecessary regulation by the Federal Government.").

[53] H.R.REP. No. 1069, 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2283, 2304.

[54] 49 U.S.C. § 10101(a)(2) (1982); *see* Motor Carrier Act of 1980, Pub.L. No. 96-296, § 3(a), 94 Stat. 793, 793 (codified at 49 U.S.C. § 10101 note (1982)); H.R.REP. No. 1069, 96th Cong., 2d Sess. 3 ("The legislation establishes a new Federal policy which is to promote a competitive and efficient motor carrier industry . . . ."), *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2283, 2285.

[55] *See* Motor Carrier Act of 1980, Pub.L. No. 96-296, § 10(b), 94 Stat. 793, 800 (codified at 49 U.S.C. § 10930(a) (1982)).

a contract carrier could serve,[56] (3) removing restrictions on the nature of shippers, commodites shipped, and permissible geographic scope of contract carrier permits,[57] (4) allowing contract carriers to serve freight forwarders,[58] and allowing contact carriers to utilize trailer-on-flatcar service.[59] Many of these provisions ratified prior decisions of the Commission.[60]

Despite the fact that the Motor Carrier Act of 1980 did not amend the text of the exemption provision, the Commission believes that the facial breadth of the provision, in light of the amended transportation policy which that provision explicitly incorporates by reference, entitles it to exempt all motor carriers of property from the tariff-filing requirements. Before evaluating this claim, however, we must resolve two antecedent issues, one jurisdictional and one procedural.

III. Threshold Issues

A. *Petitioners' Standing to Challenge the Commission's Exemption Decisions*

One respondent challenges the standing of petitioners Eastern Central Motor Carriers Association, Inc. and

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[56] *See id.* § 10(a)(1), 94 Stat. at 799-800.

[57] *See id.* § 10(a)(3), 94 Stat. at 800 (codified at 49 U.S.C. § 10923(d)(1)).

[58] *See id.* § 10(c)-(d), 94 Stat. at 800-801 (codified at 49 U.S.C. §§ 10749(a)-(b)(1), 10766(b)).

[59] *See id.* § 34(b), 94 Stat. at 825 (codified at 49 U.S.C. § 10923(e))

[60] *See* H.R.Rep. No. 1069, 96th Cong., 2d Sess. 22-23, *reprinted in* 1980 U.S.Code Cong. & Ad.News 2283, 2304-05.

The Commission now allows contract carriers to serve entire industries. *See Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Industry-Wide Services*, 133 M.C.C. 298, 303 (served 28 Dec. 1983) (Ex Parte No. MC-165 (Sub-No. 1)), *petition for review dismissed as not ripe sub nom. American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 747 F.2d 787 (D.C.Cir. 1984).

Regular Common Carrier Conference, Inc. This respondent claims that some members of these organizations are not averse to the Commission's broad exemption and may even hold contract carriage authority themselves.

Respondent's standing analysis is irrelevant and misguided. It is irrelevant because even if these two petitioners lack standing, other (individual) petitioners clearly have standing to raise (and have raised) identical claims. It is misguided because, according to the Supreme Court, an association has standing [61] if "its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action.[62]

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[61] Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

[62] *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975) (emphasis added and citations omitted).

One respondent also argues that petitioner Eastern Central Motor Carriers Association, Inc. cannot maintain this petition consistent with the provisions of law enabling its establishment as a tariff bureau that would otherwise violate the antitrust laws. *See* 49 U.S.C. § 10706(b)(2) (1982) (antitrust immunity for certain Commission-approved rate agreements); 49 U.S.C. § 10706(b)(3)(B)(iii) (tariff bureau may not file a protest against any tariff item published by a motor carrier); Joint Brief of Intervenors Schneider Transport, Inc., R.C. Service, Inc., Distribution Service System, Inc., Warren Transport, Inc., and CECO Transport, Inc. in Support of Respondents at 21-22, Nos. 83-1581, 83-1761 & 83-1973. It may well be that, even if respondent's reading of § 10706 is correct, its appropriate course would be to seek Commission action under that section, *see* 49 U.S.C. § 10706(f)-(h) (authority to review, modify and terminate antitrust immunity), rather than dismissal of

B. *Petitioners' Asserted Right to Formal Adjudication of Tariff-Filing Exemptions*

Petitioners claim that the Motor Carrier Act authorizes exemptions solely on a case-by-case basis and that they were entitled to formal adjudication of their grievance, including the right to oral presentation and cross-examination of witnesses. They contend that the Commission's rulemaking impermissibly ignored these procedural safeguards.

We agree that petitioners are entitled to a "hearing." Although the version of the exemption provisions appearing in the *United States Code* requires only that the Commission "begin a proceeding," [63] the original section 218(a) enacted by Congress provided expressly for a hearing:

> Any such carrier or carriers, or any class or group thereof may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, *after hearing*, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in this Act.[64]

The 1978 recodification of section 218(a) which substituted "begin a proceeding" for "after hearing," was not

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Eastern's petition or adjudication of Eastern's antitrust liability in this proceeding. We need not reach that point, however, since even if Eastern is not competent to challenge the Commission's decision, several other petitioners most certainly are.

[63] 49 U.S.C. §§ 10702(b), 10761(b), 10762(f).

[64] Motor Carrier Act, 1935, ch. 498, § 218(a), 49 Stat. 543, 562 (codified with some differences in language but without substantive change at 49 U.S.C. §§ 10702(b), 10761(b), 10762(f)) (emphasis added).

intended to effect any substantive change.[65] Accordingly, we hesitate to say that Congress eliminated the hearing requirement in 1978.

But the language of the exemption—which expressly contemplates class-wide relief—rejects the notion that the Commission may grant exemptions solely on an ad hoc basis. Petitioners' analysis runs further awry when it assumes that "hearing" denotes a formal, trial-type proceeding. The Administrative Procedure Act[66] does not require formal proceedings unless the pertinent statute in some way indicates that the required hearing on a generalized issue is "on the record."[67] Under settled case law, in the absence of specific direction from Congress that a hearing is to be conducted "on the record" (or words to that effect), informal proceedings such as notice-and-comment rulemaking are entirely satisfactory.[68]

Recognizing that it is the agency's choice, in the first instance, whether to change policy through notice-and-comment rulemaking or case-by-case adjudication,[69] we

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[65] *See* Act of 17 Oct. 1978, Pub.L. No. 95-473, § 3(a), 92 Stat. 1337, 1466; H.R.REP. No. 1395, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S.CODE CONG. & AD.NEWS 3009, 3018.

[66] 5 U.S.C. §§ 551, 553-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1982).

[67] *See United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 237-38, 240, 93 S.Ct. 810, 817, 818, 35 L.Ed.2d 223 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57, 92 S.Ct. 1941, 1950, 32 L.Ed.2d 453 (1972).

[68] *See United States v. Florida East Coast Ry. Co.*, 410 U.S. at 237-38, 240, 93 S.Ct. at 817, 818.

[69] *See NAACP v. Federal Power Comm'n*, 425 U.S. 662, 668-69, 96 S.Ct. 1806, 1810-11, 48 L.Ed.2d 284 (1976); *National Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 134 (1974); *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947) ("[T]he choice between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." (citation

cannot say that the Commission—faced with a problem afflicting hundreds, perhaps thousands, of carriers—was unreasonable to select rulemaking.[70] Courts must refrain from substituting their judgment as to proper procedure for that of the agency.[71]

IV. The Commission's Statutory Authority for Exempting All Motor Contract Carriers of Property from Tariff-Filing Requirements

A. *Standard of Review*

Although "courts are the final authorities on issues of statutory construction,"[72] the Supreme Court has recently instructed us, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[73] to give "considerable weight . . . to an executive department's construction of

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omitted)); *Independent U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 917 (D.C.Cir. 1982); *Trans-Pacific Freight Conference v. Federal Maritime Comm'n*, 650 F.2d 1235, 1244 (D.C.Cir. 1980), *cert. denied*, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 840 (1981).

[70] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 166 (1983) (Ex Parte No. MC-165) (Andre, Comm'r, concurring) ("However, that process [continued individual exemptions] would necessarily involve a high cost in terms of legal and administrative fees. A blanket exemption will reduce these costs substantially, with the advantage that the remaining contract carriers will receive relief simultaneously."); *cf. Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 44, 84 S.Ct. 1105, 1112, 12 L.Ed.2d 112 (1964) ("There would be a vast proliferation of hearings . . . We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled." (citations and footnote omitted)).

[71] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 98 S.Ct. 1197, 1211-14, 55 L.Ed.2d 460 (1978).

[72] *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981); *accord, Aero Mayflower Transit Co. v. Interstate Commerce Comm'n*, 686 F.2d 1, 5-6 (D.C.Cir. 1982).

[73] —— U.S. ——, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

a statutory scheme it is entrusted to administer."[74] Of particular importance to this case, the Justices cautioned that "[i]f . . . the court determines [that] Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.[75]

Because the exemption provisions assign broad authority to the Commission—requiring only that exemption be in the "public interest" and consistent with a potpourri of ill-defined and conflicting ad hoc admonitions combined to form, rather optimistically we think, a "national transportation policy"—the agency's interpretative domain is at its zenith and the judicial license at its nadir. Congress's broad delegation to the Commission constrains us to uphold the Commission's authority as a reasonable, though not singular, interpretation of the exemption provisions.

B. *The Commission's Construction is Permissible*

The Commission's assertion of authority is in harmony with the facially sweeping text of the statutory

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[74] *Id.* at 2782 (footnote omitted).

[75] *Id.* (footnote omitted); *accord, Railway Labor Executives' Ass'n v. United States R.R. Retirement Bd.*, 749 F.2d 856, 860 (D.C.Cir. 1984); *American Methyl Corp. v. Environmental Protection Agency*, 749 F.2d 826, 833 (D.C.Cir. 1984); *State of Montana v. Clark*, 749 F.2d 740, 744-746 (D.C.Cir. 1984); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 140-41 (D.C.Cir. 1984); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566-67 (D.C. Cir. 1984) (en banc); *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 39, 102 S.Ct. 38, 46, 70 L.Ed.2d 23 (1981); *Environmental Protection Agency v. National Crushed Stone Ass'n*, 449 U.S. 64, 83-84, 101 S.Ct. 295, 306-307, 66 L.Ed.2d 268 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 749 F.2d 875, 880 (D.C.Cir. 1984); *Indiana & Mich. Mun. Distribs. Ass'n v. Federal Energy Regulatory Comm'n*, 659 F.2d 1193, 1196 (D.C.Cir. 1981).

exemption provisions. These provisions uniformly sanction relief "when relief is consistent with the public interest and the transportation policy of section 10101 of this title." [76] The original provisions—whose substance continues in force despite the semantic changes wrought by the 1978 recodification—stressed the breadth of the Commission's discretion by stating that "the Commission may . . . grant such relief *to such extent and for such time, and in such manner as in its judgment* is consistent with the public interest and the [national transportation] policy." [77] What we have, to use the Fifth Circuit's words, is a congressional charge to "go forth and do good." [78] The delegation to the Commission is as broad as Congress could make without giving the Commission carte blanche. If Congress intended the Commission's exemption authority to be "specific and limited," as petitioners assert,[79] we would expect at least some limiting criteria—criteria which are conspicuously absent.[80] We give great weight to this straightforward reading of the statutory text.[81]

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[76] 49 U.S.C. §§ 10702(b), 10761(b), 10762(f) (1982).

[77] Motor Carrier Act, 1935, ch. 498, § 218(a), 49 Stat. 543, 562 (emphasis added).

[78] *Central Forwarding, Inc. v. Interstate Commerce Comm'n*, 698 F.2d 1266, 1284 (5th Cir. 1983) (quotation marks omitted).

[79] Joint Brief for Petitioners and Intervening Petitioners at 22, Nos. 83-1581, 83-1761 & 83-1973.

[80] The legislative history of the Motor Carrier Act of 1935 likewise denies that the exemption power is narrow. Senator Wheeler, floor manager of the bill that became the 1935 Act, remarked that "[t]he Commission is authorized . . . to grant relief from the provisions of this paragraph. This section is so worded as to permit of suitable flexibility and relief of operators from any requirements which may be unduly burdensome and not productive of any good result." 79 CONG.REC. 5656 (1935).

[81] *See Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239 (1978) (quoting *Blue Chip*

Other courts have likewise literally construed facially broad authority to exempt shippers from various restraints. For example, in *American Trucking Associations, Inc. v. Interstate Commerce Commission*,[82] the Fifth Circuit affirmed an Interstate Commerce Commission decision exempting trailer-on-flatcar and container-on-flatcar service from regulation.[83] The exemption authority directed the Commission to exempt rail carriers when consistent with the rail transportation policy and when either the exempted transaction or service is of limited scope or the exemption does not leave shippers vulnerable to abuse of market power.[84]

This circuit has similarly upheld broad Commission exemptions predicated on ill-defined statutory criteria. In our own *American Trucking Associations v. Interstate Commerce Commission*,[85] we affirmed a decision by the Commission to exempt motor carriers from a statutory prohibition against holding both common and contract authority over the same route or in the same area,[86] pursuant to a proviso permitting exemption if the Commission "shall find that such certificate and permit may be held consistently with the public interest and the [na-

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Stamps v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring)); *National Ass'n of Recycling Indus. v. Interstate Commerce Comm'n*, 660 F.2d 795, 799 (D.C.Cir. 1981) (citing *Lewis v. United States*, 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980)); *March v. United States*, 506 F.2d 1306, 1313 (D.C.Cir. 1974)).

[82] 656 F.2d 1115 (5th Cir. 1981).

[83] *See id.* at 1125-27.

[84] *See* 49 U.S.C. § 10505(a) (1982). The rail transportation policy is set forth at *id.* § 10101a.

[85] 602 F.2d 444 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979).

[86] *See id.* at 451-52.

tional transportation] policy." [87] We began "with the well settled principle that in confusing statutory language we look first to the wording of the statute and that such wording should be given its plain, obvious and rational meaning." [88]

We also held ourselves bound by the " 'literal or usual meaning' " [89] of the words in a statute when we affirmed a tariff-filing exemption granted by the Civil Aeronautics Board [90] pursuant to authority permitting exemption when "appropriate." [91] Admittedly, the language and legislative history of all these exemption provisions differ from that of the provision at hand.[92] But these periph-

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[87] Motor Carrier Act, 1935, ch. 498, § 210, 49 Stat. 543, 554 (repealed 1980).

[88] 602 F.2d at 449-50 (footnote omitted).

[89] *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 827 (D.C.Cir. 1980) (quoting *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978) (in turn quoting *Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965)); *see id.* at 827-28.

[90] *See id.* at 827-31.

[91] Act of 9 Nov. 1977, Pub.L. No. 95-163, § 17(a), 91 Stat. 1278, 1285, *repealed by Airline* Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705.

[92] For example, petitioners attempt to distinguish the Fifth Circuit's decision in *American Trucking Associations* by stating that Congress charged the Commission to deregulate rail carriers but not motor carriers. This is difficult to square with section 2 of the Motor Carrier Act of 1980, which states that "[t]his Act is part of the continuing effort by Congress to reduce unnecessary regulation by the Federal Government." 49 U.S.C. § 10101 note (1982). It is also at odds with the amended national transportation policy, which is now aimed at "promot[ing] competitive and efficient transportation services." *Id.* § 10101(a)(2).

Petitioners also note that the Commission's power to exempt motor carriers is permissive, *see id.* §§ 10702(b), 10761(b), 10762(f) ("may"), while its power to exempt railroads is mandatory,

eral distinctions should not cloud the precedent for giving facially broad exemption authority the full sweep suggested by the words of a statute.

The Commission's interpretation appears all the more reasonable considering petitioners' arguments for confining the exemption power to "specific and limited circumstances." [93] We can see no way to cabin the Commission's authority without rewriting the statutory text, an act unquestionably outside the province of the judiciary.

1. *A rule of statutory construction*

Petitioners first argue that blanket or categorical exemptions are permitted only in extraordinary circumstances. The cited cases, however, reveal that this disfavor extends only to agencies' attempts to *create* exemptions not authorized by statute, not express power anchored in the broad terms of an enactment.[94]

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see id. § 10505(a) ("shall"). Although the Commission has less discretion in the latter case than in the former, its *power* to exempt is the same in both cases. The language difference goes only to *when* the Commission's power is to be exercised, not to the scope of the power itself.

[93] Joint Brief for Petitioners and Intervening Petitioners at 22, Nos. 83-1581, 83-1761 & 83-1973.

[94] *See Alabama Power Co. v. Costle*, 636 F.2d 323, 357-61 (D.C. Cir. 1979) and cases cited therein.

Although the agency also pointed to an express exemption provision in *Alabama Power Co.*, the provision authorized only limited exemptions—and we did not purport to construe it narrowly. As it turned out, the agency "concede[d] that its exemption . . . [was] an 'expansion' of the limited exemption provided" by Congress which was not "consistent with the statutory language of the Clean Air Act." *Id.* at 356. We accordingly held that "EPA's 'expansion' of the . . . [statutory] exemption falls well beyond the agency's [express] exemption authority." *Id.*

2. *Arguments based on the Motor Carrier Act of 1957*

Petitioners make much of the fact that the 1957 Motor Carrier Act strengthened the tariff-filing requirements (by requiring the filing of rate schedules containing actual as well as minimum rates) and that the 1980 Act failed to amend it. Although the import of this historical observation is not self-evident, petitioners' argument seems to take two forms. First, petitioners appear to argue that, because Congress did not rescind the tariff-finding requirements when it had the opportunity to do so in 1980, the Commission may not do so now. Building on their observation that Congress could have amended the tariff-filing requirements in 1980, petitioners add that before the 1980 Act, the Commission enforced the tariff-filing requirements and granted exemptions rarely and only on a limited basis. Petitioners infer —from Congress's failure to amend the filing requirements—a positive congressional intent that they continue to be enforced with but limited exceptions. For petitioners, legislative inaction is pregnant with meaning.

Courts, however, recognize that legislative inaction is a dangerous foundation for statutory construction. As we recently observed:

> The general rule is that congressional inaction or congressional action short of the enactment of positive law, like post-enactment legislative history, is often entitled to no weight in construing a statute. . . . Inaction by Congress is due generally to reasons too diffuse, ephemeral, and ultimately unaccountable for it to confine this process of regulatory adaptation to changing circumstances.[95]

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[95] *Advanced Micro Devices v. Civil Aeronautics Bd.*, 742 F.2d 1520, 1541-42 (D.C.Cir. 1984) (citing Easterbrook, *Statutes' Domains*, 50 U.CHI.L. REV. 533, 537-39 (1983)). For an example of the difficulties posed, see *Motor Vehicle Mfrs. Ass'n v. State Farm*

Legislative inaction is a particularly ambiguous and unreliable indicator in this case. The ambiguity stems from the fact that legislative inaction in this instance is a two-edged sword. While Congress did not tamper with the tariff-filing requirements, neither did it amend the broadly-worded exemption provisions.[96] A detached observer would conclude that it was unreasonable to expect Congress to do so—Congress could not have broadened the exemption power without totally abdicating the lawmaking function to the agency.

Moreover, the legislative history indicates that petitioners' "congressional-acquiescence-by-silence" inference is not reliable. The Senate report specifically cautions that Congress should *not* be presumed to have removed all the unnecessary regulation that the legislature would like pruned: "In addition to the specific provisions of this bill, there are other areas where the Committee did not act, either because it approved of current Commission policy or felt that the Commission was the proper forum for the interested parties to address the issues."[97] There is nothing to indicate that Congress exhausted the deregulatory agenda it set in the 1980 Motor Carrier Act. For all that we can infer from the lack of mention of tariff filing in the pertinent hearings and committee reports, Congress did not exempt contract carriers because contract carriers did not ask it to do so.

More fundamentally, we cannot equate Congress's treatment of the tariff-filing requirements with legisla-

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Mutual Automobile Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 2867-68, 77 L.Ed.2d 443 (1983).

[96] The Motor Carrier Act of 1957 also left the exemption power intact. Indeed, the legislative history of the 1957 legislation recognized the continuing vitality of that provision. *See* S.REP. No. 335, 85th Cong., 1st Sess. 4 (1957).

[97] S.REP. No. 641, 96th Cong., 2d Sess. 4 (1980). Although Congress did not adopt the Senate bill, there is no evidence of disagreement on this point.

tive neglect. Although Congress amended neither the requirements nor the exemption authority by their terms, it did what was functionally equivalent—it amended the national transportation policy (which the exemption provision incorporates by reference) to reduce unnecessary federal regulation and to substitute the discipline of the marketplace in its stead.[98]

Congress's revision of the national transportation policy controls the breadth of the Commission's exemption power. The text of the exemption provision authorizes "relief when relief is consistent with the public interest and the transportation policy of section 10101 of this title."[99] The legislative history of the 1980 Motor Carrier Act reiterates Congresss' command, declaring that "[t]he National Transportation Policy sets the tone for the regulatory structure and is the basis for determining the meaning of statutory provisions."[100]

The recently revised national transportation policy, as described in part II above, is the philosophical standard-bearer of the 1980 Act and supports much broader exemptions than would have been appropriate under the earlier protectionist and anticompetitive legislation on which petitioners pin their hopes. In particular contrast to the 1957 legislation, the new standard provides that "it is the policy of the United States Government . . .

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[98] *See Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1381-85 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984). Petitioners attempt to distinguish *Ryder* on the ground that the court in that case deferred review until such time as the Commission's policy change is applied in individual cases. In point of fact, the court did not defer decision; it merely stated that it would be on the look-out for attempts to circumvent the Commission's policy when individual adjudications come up for judicial review. *See id.* at 1386.

[99] 49 U.S.C. §§ 10702(b), 10761(b), 10762(f) (1982).

[100] H.R.REP. No. 1069, 96th Cong., 2d Sess. 11-12, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2283, 2293-94.

to promote competitive and efficient transportation services [by motor carrier]." [101] To borrow the words of the authoritative House Committee report, "[t]he legislation establishes a new Federal Policy which is to promote a competitive and efficient motor carrier industry." [102] "It is clearly the Committee's intent that the Commission must recognize the importance of competition and efficiency in motor carrier operations as *the most desirable means for achieving national transportation goals and objectives.*" [103] Although the Commission's broad exemption would be odd and out of place if the calendar read 1957, it is in touch with the market-oriented regulatory policy of the 1980s.[104]

The Commission amply grounded its broad exemption in the newly-revised national transportation policy:

> We recognize that one of the purposes of the 1957 legislation, which was initiated by the Commission, may have been to protect common carriers from competition from contract carriers and that public availability of competitors' rates was one of the ingredients of that protection. But a quarter of a century has elapsed since then, and many of the assumptions underlying the role of transportation regulation have substantially changed.

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[101] 49 U.S.C. § 10101(a)(2) (1982).

[102] H.R.REP. No. 1069, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS 2283, 2285.

[103] *Id.* at 12, *reprinted in* 1980 U.S.CODE CONG. & AD.NEWS at 2294.

[104] Petitioners quote the following language from Congress's findings to support their view that the legislature intended to keep the Commission on a tight rein: "[T]he Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress." 49 U.S.C. § 10101 note (1982). Petitioners' point, however, begs the question whether the Commission has in fact exceeded its statutory authority. As explained in text, we conclude that it has not.

> Whatever may have been the goals of rate regulation in 1957, the Motor Carrier Act [of 1980] has revised the [Interstate Commerce] [A]ct to mandate enhanced competition and efficiency. We think it is beyond question that the elimination of the tariff filing requirement will promote both aspects of this goal. The threat of new entry and freedom over prices and services are at the core of the new regulatory scheme. The action taken here will simplify new entry since it will eliminate the delay that accompanies the filing of tariffs for new contract customers. Similarly, carrier and shipper willingness to experiment with new price/service options will not be dampened by the burdensome need to reflect each such change in an additional tariff filing.[105]

3. *Parsing the statutory text*

Raising the debate to a higher, lexicographical plane, petitioners object to an industry-wide exemption because the exemption authority limits relief to (at most) a "group of contract carriers" [106] and, according to any

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[105] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 158 (1983) (Ex Parte No. MC-165) (footnote omitted).

In an additional argument claiming legislative adoption by implication, petitioners intimate that Congress codified the Commission's representation before this court in *American Trucking Ass'ns, Inc. v. United States*, 602 F.2d 444 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979), that the agency would use the tariff-filing requirements to monitor and control dual common/contract authority rate abuses, *see id.* at 451. Petitioners cite no evidence by which congressional adoption of this litigation position can be said to have occurred.

[106] 49 U.S.C. §§ 10702(b), 10761(b), 10762(f) (1982). Actually, the original provision referred to "any class or group" of contract carriers. *See Motor Carrier Act*, ch. 498, § 218(a), 49 Stat. 543, 562. When the provision was recodified, "[t]he word 'group' [was] substituted for 'any class or group' as being more inclusive." H.R. REP. No. 1395, 95th Cong., 2d Sess. 69, *reprinted in* 1978 U.S.CODE

dictionary of the English language, the term "group" can only encompass some *subset* of a given set, here the set of motor contract carriers. An industry-wide exemption, petitioners contend, is obviously inappropriate. Petitioners' argument—though intriguing—depends on a faulty factual premise. The Commission's exemption does not cover *all* motor contract carriers—passenger carriers (such as bus companies) must still file tariffs.[107]

4. *Arguments based on the statute's design*

Citing the maxim that disfavors interpretations of statutory provisions which render other provisions of the same act superfluous or inoperative,[108] petitioners argue that the Commission's broad exemption renders important components of the Motor Carrier Act unenforceable. Specifically, they contend that if implemented the tariff-filing exemption will as a practical matter nullify the Commission's power to suspend and investigate rates[109] and the right of common carriers and the public to challenge those rates in complaint proceedings.[110]

CONG. & AD.NEWS 3009, 3078. Since "class" relief may encompass the entire class of motor contract carriers, "group" relief (which must be "more inclusive" than "class" relief, according to the recodifiers) may similarly extend to all motor contract carriers.

[107] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 152 (1983) (Ex Parte No. MC-165).

[108] *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 519-20, 99 L.Ed. 615 (1955); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1362 (D.C.Cir. 1980); *Motor & Equip. Manufs, Ass'n, Inc. v. Environmental Protection Agency*, 627 F.2d 1095, 1107-08 (D.C.Cir. 1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980); 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 46.06, at 107 (N. Singer rev. C. Sands 4th ed. 1984).

[109] *See* 49 U.S.C. §§ 10704(a)(1), (c)(1), (f), 10708(a)(1) (1982).

[110] *See id.* §§ 10704(f), 10708(f).

Assuming that we agreed with petitioners that tariff filing is essential to effective rate regulation, these provisions would not be relevant because contract carriers of passengers continue to file tariffs even under the Commission's broad exemption.[111]

Moreover, published rate schedules, far from being necessary prerequisites to rate challenges, at most *facilitate* enforcement. Illegal rates can be exposed, complaints filed, and rates suspended without government-mandated price disclosure, just as the antitrust laws are enforced without the benefit of published prices. Indeed, the Commission's investigative power makes more sense in a regime *without* tariff filings than in one in which rates are a matter of public record. Exemption from tariff filing is compatible with other provisions of the statute; there is no reason to construe the exemption power narrowly.

5. *Arguments based on prior administrative practice*

Petitioners' penultimate contention is that the Commission has, in previous decisions addressing its exemption power,[112] authoritatively held it to be available only in narrow circumstances. They charge the Commission with departing from this policy without a reasoned explanation.[113]

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[111] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 152 (1983) (Ex Parte No. MC-165).

[112] *See Petition of Armored Carrier Corp. for Relief from the Provisions of Section 218(a) of the Interstate Commerce Act*, 303 I.C.C. 781 (1958); *Transportation of United States Gov't Freight by Contract Carriers by Motor Vehicle*, 301 I.C.C. 551 (1957); *Baggett Transp. Co.—Petition for Exemption—Transp. for United States Gov't*, 61 M.C.C. 771 (1953).

[113] *See Motor Vehicle Manufs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); *Advanced Micro Devices v. Civil Aeronautics Bd.*, 742 F.2d 1520, 1542 (D.C.Cir. 1984); *Wheaton Van Lines, Inc. v. Interstate*

As an initial matter, we find it difficult to believe that the Commission's three cryptic exemption cases, which are widely separated from this case in time, establish a settled rule binding on the agency here. Although it is true that the Commission's *Armored Carrier* decision [114] (which, as its caption implies, relieved armored carriers of valuables from compliance with the tariff-filing requirements [115]) exempted a rather small category of motor contract carriers, there is nothing in the opinion to suggest that this relief exhausted the Commission's exemption power. Certainly there is nothing in the case to suggest that it established standards governing future uses of the exemption authority. The cases cited by petitioners simply explain why relief is granted or denied in the particular proceeding at hand.[116]

Admittedly, the Commission's two decisions denying exemptions to contract carriers [117] necessarily held—at

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Commerce Comm'n, 671 F.2d 520, 527 (D.C.Cir. 1982); *Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 852 (D.C.Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

[114] *Petition of Armored Carrier Corp. for Relief from the Provisions of Section 218(a) of the Interstate Commerce Act*, 303 I.C.C. 781.

[115] See id. at 782-84, 788.

[116] *See Petition of Armored Carrier Corp. for Relief from the Provisions of Section 218(a) of the Interstate Commerce Act*, 303 I.C.C. at 788; *Transportation of United States Gov't Freight by Contract Carriers by Motor Vehicle*, 301 I.C.C. at 556; *Baggett Transp. Co.—Petition for Exemption—Transp. for United States Gov't*, 61 M.C.C. at 781. The *Baggett* decision is even less apposite. The "principal" issue in that case was whether the contract- and tariff-filing requirements even applied to government traffic. *See Baggett Transp. Co.—Petition for Exemption—Transp. for United States Gov't*, 61 M.C.C. at 773-81.

[117] *See Transportation of United States Gov't Freight by Contract Carriers by Motor Vehicle*, 301 I.C.C. 551; *Baggett Transp. Co.—Petition for Exemption—Transp. for United States Gov't*, 61 M.C.C. 771.

least by implication—that the tariff-filing requirements were not per se inconsistent with the public interest and the national transportation policy as of 1957. But that policy was amended by the Motor Carrier Act of 1980. And the public interest presumably changed in tune with the times. Congress monitored developments in the motor carrier industry and concluded that less regulation and more competition would improve motor carrier service. The Commission, perceiving the same changes, is entitled to update its policies as well.[118] Recalling the lengthy quotation in the preceding section, we cannot say that the Commission failed to provide a rationale for its supposed departure from precedent.[119]

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[118] [W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare *SEC v. Chenery Corp.*, 332 U.S. 194 [67 S.Ct. 1575, 91 L.Ed. 1995] (1947); *FCC v. WOKO*, 329 U.S. 223 [67 S.Ct. 213, 91 L.Ed. 204] (1946) . . . . [T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry. Co., 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967); *see Permian Basin Area Rate Cases*, 390 U.S. 747, 784, 88 S.Ct. 1344, 1368, 20 L.Ed.2d 312 (1968); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1381, 1385 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984).

[119] For the same reasons, we cannot say that Congress tacitly approved the Commission's (nonexistent) "long-standing policy" by failing to reverse it in the 1980 Motor Carrier Act.

6. *Arguments premised on the legislative policy undergirding the act*

Petitioners rightly point out that exceptions to a statute are not to be construed in such a manner that they "defeat rather than further the purpose of Congress." [120]

The short answer to this observation is that the Commission's broad exemption accomplishes nothing of the sort. Putting aside for the moment the common sense reading of the Commission's facially broad exemption power—a power constrained only by what may be charitably described as the most "open-ended" of statutory criteria—exemption of motor contract carriers of property is, as we have shown, entirely in keeping with Congress's objectives in enacting the Motor Carrier Act of 1980.

Burrowing to the root of petitioners' contention, however, we find an assertion that, as an historical matter, the principal thrust of the various Motor Carrier Acts is to assure "competitive equality." It is this belief which leads petitioners to declare that a broad exemption from the tariff-filing requirements for contract carriers—under which common carriers remain subject to requirements to publish rates and delay their implementation for thirty days—would impermissibly upset the competitive balance reached after fifty years of motor carrier legislation.

Our review of the history of motor carrier regulation, which is set out briefly in part II, leads us to the conclusion that petitioners' "competitive equality" thesis is revisionist history. Motor carrier regulation before 1980

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[120] *Corn Prods. Ref. Co. v. Commissioner*, 350 U.S. 46, 52, 76 S.Ct. 20, 24, 100 L.Ed. 29 (1955) (citation omitted); *see Piedmont & N. Ry. Co. v. Interstate Commerce Comm'n*, 286 U.S. 299, 311-12, 52 S.Ct. 541, 545, 76 L.Ed. 1115 (1932); *United States v. J.E. Mamiye & Sons, Inc.*, 665 F.2d 336, 340 (C.C.P.A. 1981); *Port of New York Auth. v. Baker, Watts & Co.*, 392 F.2d 497, 504 (D.C. Cir. 1968).

was designed to protect common carriers from competition of contract carriers, not to correct market failures and maintain a finely-tuned competitive balance between the two types of motor carriers. The 1980 Act to a large extent replaced protectionism and administrative regulation with the competitive oversight of the marketplace. The Commission's assertion of statutory authority to exempt a broad class of motor contract carriers is consistent with this Act.

V. Reasonableness of the Commission's Decision to Exempt All Motor Contract Carriers of Property From Tariff-filing Requirements

A. *Standard of Review*

Under the Administrative Procedure Act,[121] the Commission's broad exemption must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [122] "The scope of review under the 'arbitrary and capricious' standard," as the Supreme Court has recently reminded us, "is narrow and a court is not to substitute its judgment for that of the agency." [123] Our role is to determine " 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " [124] As we stated when ruling on the propriety

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[121] 5 U.S.C. §§ 551, 553-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1982).

[122] *Id.* § 706(2)(A).

[123] *Motor Vehicle Manufs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); *accord, Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 441-42, 42 L.Ed.2d 447 (1974).

[124] *Motor Vehicle Manufs. Ass'n, Inc. v. State Farm Mutual Automobile Ins. Co.*, 103 S.Ct. at 2867 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 138 (1971)).

of another tariff-filing exemption, this standard is "highly deferential." [125]

Deference is particularly appropriate when—as here—the delegation of exemption power is very broad and necessarily involves the administrative weighing of the costs and benefits of regulation.[126] "Because we lack the knowledge and experience needed to evaluate the transportation requirements of the nation, we accord the Commission a great deal of discretion and appropriately defer to its expertise." [127] The determinations we review in the next section "epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency." [128]

B. *The Commission's Exemption is Consistent with the Public Interest and the National Transportation Policy*

The exemption provisions authorize the Commission to "grant relief . . . when relief is consistent with the public interest and the [national] transportation policy." [129]

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[125] *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 826 (D.C.Cir. 1980).

[126] *Cf. Local 814, Int'l Bhd. of Teamsters v. National Labor Relations Bd.*, 546 F.2d 989, 991 (D.C.Cir. 1976) (per curiam) ("[W]here, as here, an agency is charged with administering a broad statutory mandate, courts must of necessity defer to agency judgment." (citations omitted)), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

[127] *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 656 F.2d 1115, 1125 (5th Cir. 1981) (quoting *American Trucking Ass'n, Inc. v. United States*, 642 F.2d 916, 920 (5th Cir. 1981)).

[128] *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1343 (D.C.Cir. 1985) (quoting *Office of Communication of United Church of Christ v. Federal Communications Comm'n*, 707 F.2d 1413, 1440 (D.C.Cir. 1983)).

[129] 49 U.S.C. §§ 10702(b), 10761(b), 10762(f) (1982).

According to the Commission, "[t]he public interest lies in ready access to competitive, efficient, and reasonably priced motor carrier service when and where needed." [130] Under the recently amended national transportation policy, "it is the policy of the United States Government[,] . . . in regulating transportation by motor carrier, to promote competitive and efficient transportation service." [131]

The administrative record provides substantial support for the Commission's finding that its broad exemption comports with the public interest and the national transportation policy.

1. *Tariff filing is unnecessary*

a. *Exemption does not put motor common carriers at an unfair competitive disadvantage contrary to the purposes of the Motor Carrier Acts*

Petitioners insist that removal of the tariff-filing requirements for a broad class of contract carriers will impose a disproportionately heavy regulatory burden on common carriers vulnerable to abusive rate-cutting, predatory pricing, and "secret pricing"; and will in general give contract carriers an unfair competitive advantage.

As an initial matter, it bears mentioning that competitive disadvantage is not necessarily contrary to the purposes of the amended Motor Carrier Act. The Act does not prescribe "competitive equality." As demonstrated in part II, the 1935 Act and the 1957 amendments were designed to insulate common carriers against competition from contract carriers, not to establish competitive equality between them. The 1980 Act is directed to promote competition in motor carrier services; it does not

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[130] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 157 (1983) (Ex Parte No. MC-165).

[131] 49 U.S.C. § 10101(a)(2) (1982).

mandate that each type of motor carrier bear the same regulatory burden.[132]

Nor can avoidance of competitive disadvantage be inferred from the national transportation policy. The requirement of "impartial regulation" applies to "the modes of transportation subject to this subtitle." [133] The modes specified are motor, water, and rail carriers, among others; [134] contract and common carriers are two *forms* of *one* mode of carriage. Because the two types of motor carriers are not modes themselves, the requirement does not govern regulation affecting carriers alone.

In any event, petitioners' fears of competitive disadvantage are greatly exaggerated. One source of potential disadvantage is the cost of unilateral compliance with tariff-filing requirements. But although the Commission calculated the *aggregate* savings from its broad exemption to be substantial, it did not find the cost of rate publication to be so high as to impose a serious competitive disadvantage on *individual* unexempted common carriers. This conclusion is reasonable because common carriers spread the costs of filing tariffs by publishing their rates collectively through rate bureaus—contract carriers do not. For their part, petitioners totally fail to meet the Commission's claim. On the one hand, they assert that the cost of tariff filing is sufficient to put common carriers at a competitive disadvantage. And yet, on the other hand, they insist that these costs do not warrant exemp-

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[132] That competitive disadvantage is not itself contrary to the Motor Carrier Acts may be seen in the provision stating that traffic diversion is not itself a ground for denying a certificate for licensing a new common carrier. *See id.* § 10922(b)(2)(B); *Refrigerated Transp. Co. v. Interstate Commerce Comm'n*, 709 F.2d 1430, 1433 (11th Cir. 1983) (per curiam).

[133] 49 U.S.C. § 10101(a).

[134] *See id.* §§ 10101-11917.

tion of contract carriers from tariff-filing requirements.[135] The Commission has provided a plausible explanation for its position and petitioners have given us no reason to doubt it.

Petitioners also claim that common carriers will be put at a competitive disadvantage because exemption from tariff filing will allow contract carriers to charge noncompensatory rates. As a factaul matter, this concern is unfounded. Approximately 250 individual exemptions were granted by the Commission before this rulemaking.[136] No complaints were filed and historically none are.[137] Presumably potential rate-cutters are deterred by the Commission's continuing authority to investigate and suspend unlawful rates.[138] As a check on Commission nonfeasance, common carriers themselves can expose unlawful rates and file complaints[139] using the same techniques businesses use to challenge restraints on trade under the antitrust laws (which are of course also enforced without the benefit of published prices).

In addition, petitioners raise the specter of "secret pricing" if the tariff-filing requirements are lifted. But common carriers should find it even easier to expose "secret rates" than noncompensatory rates. Noncompensatory rates are by their nature a bargain for the shipper, who thus has every reason to keep quiet. With compensatory but "secret" rates, however, the shipper has an incentive to disclose the rate to start a bidding war

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[135] *See* Joint Brief for Petitioners and Intervening Petitioners at 34, 39, Nos. 83-1581, 83-1761 & 83-1973.

[136] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 166 (1983) (Ex Parte No. MC-165) (Andre, Comm'r, concurring).

[137] *See id.* at 164.

[138] *See* 49 U.S.C. §§ 10704(a)(1), (c)(1), (f), 10708(a)(1) (1982).

[139] *See id.* §§ 10704(f), 10708(f).

between carriers interested in his business.[140] Publication of rates alone would not help common carriers compete for contract carriage in any event: the common carrier would still lack essential terms which are contained only in the contract.[141] Contrary to petitioners' line of reasoning, "open pricing" may even be anticompetitive —it may facilitate "price matching."[142] We find more than sufficient support for the Commission's conclusion that eliminating the tariff-filing requirements (and "open pricing" along with it) is more likely, on balance, to increase competition than it is to decrease it.[143]

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[140] Experience with transportation sectors not covered by tariff-filing requirements demonstrates that " 'open pricing' . . . is not necessary to achieve acceptable competitive performance." *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 165 (1983) (Ex Parte No. MC-165 (Andre, Comm'r, concurring).

[141] Given the nature of contract carriage, in which many of the essential terms of the carrier's undertaking are in the private contract and not the public tariff, it appears that a carrier truly interested in offering a competitive service would have to contact the shipper regardless of whether tariffs are filed.

Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. at 154 n. 8; *see id.* at 158-59 n. 15 ("[T]here is no statutory requirement that contract tariffs include all the particulars of the proffered service, and indeed it is unlikely that they could. See 49 U.S.C. § 10762(a)(1). Consequently, the easy price comparison that is the foundation of the open price argument has never been a real possibility.").

[142] *See id.* at 1[illegible] (Andre, Comm'r, concurring); *accord, Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n*, 440 U.S. 69, 80-81, 99 S.Ct. 925, 933, 59 L.Ed.2d 153 (1979); *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 830 (D.C.Cir. 1980).

[143] [T]he posting of prices that we are here concerned with takes place in the context of rules that impose additional cost and delay in effecting price changes. These rules provide for the possibility of a legal challenge to the posted prices, wholly apart from their acceptability in the marketplace. Given these

Last, petitioners fear predatory pricing on the part of contract carriers. The assumption underlying this concern is that contract carriers will use "secret" *and* noncompensatory rates to undercut common carriers, drive them out of business, and then, when the market is cleared of competitors, raise their rates. Not only is it exceedingly unlikely that predatory pricing will go undetected, for the reasons given above, but the low barriers to entry into the trucking business (including the newly liberalized entry requirements [144]) mean that predators cannot expect to earn monopoly profits and thereby recoup their (heavy) initial losses. This risk, considered ex ante, should dissuade potential predators from attempting to engage in predatory pricing in the first place.[145]

Not only is the purported competitive disadvantage greatly oversold, but even if petitioners' claims are taken at face value the common carrier system will not be dismantled. As we stated in our order lifting the stay of the Commission's orders pending appeal: "Petitioners may seek to eliminate the alleged competitive advantage

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facts, and considering the demonstrated competitive vigor in the already exempt trucking sectors, we believe that disinterested experts would agree that elimination of the tariff requirement will enhance competition. The support of the FTC for the proposed exemption is strong evidence that our belief is correct.

Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. at 159 n. 15; *see id.* at 165-66 (Andre, Comm'r, concurring).

[144] *See* 49 U.S.C. § 10922(b)-(c), (g) (1982).

[145] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 160-61; *id.* at 167 (Andre, Comm'r, concurring).

Petitioners' arguments also overlook some competitive advantages common carriers retain even under the Commission's exemption. For example, common carriers can typically serve a new shipper without delay (within the scope of their certificates), while contract carriers must apply for a permit to serve each new shipper.

given to the contract carriers simply by engaging in the contract carrier trade themselves." [146] Under the 1980 Motor Carrier Act, carriers no longer have to choose between common and contract carriage; instead they may serve both trades. Thus, if the Commission's exemption—by making contract carriers more efficient relative to common carriers—causes some common carriers to become contract carriers, the upshot will be a decline in common *carriage*, not common *carriers*, because common carriers may choose to acquire contract authority under the newly liberalized entry standards and serve *the very same trade* they had previously served, albeit in a different capacity. It makes no difference to the carrier whether its revenues are derived from common or contract carriage. And even if existing common carriers decide to convert completely to serve contract carriage, then "the ease with which the trucking business can be entered assures that converting [sic] carriers will be replaced without meaningful disruption." [147]

On the remote possibility that contract carriers enjoy any vestigial advantage, the utility-maximizing course of action is the one freeing common carriers from the regulatory ties that bind [148] rather than granting, to use the

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[146] *Central & Southern Motor Freight Tariff Ass'n, Inc. v. United States*, Nos. 83-1581, 83-1740 & 83-1973 (D.C.Cir. 28 Sept. 1984).

[147] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 159 n. 16. Moreover, if a carrier can serve the contract and common carriage trade simultaneously, then rates and service mix will be dictated by the needs of shippers —a marketplace result consistent with the objectives of the 1980 Motor Carrier Act.

[148] The proposed reduction in notice requirements [from 30 to either one or five days] should also assist common carriers in meeting competition from motor contract carriers and rail carriers, and in attracting traffic from private carriage. The Commission recently exempted contract carriers from all tariff filing requirements. Ex Parte No. MC-165, *Exemption of Motor Contract Carriers From Tariff Filing Requirements*, 48 FR

Commission's words, petitioners' "unappealing request for equality of disadvantage."[149] Any residual competitive disadvantage is inherent in the common carrier mode of service.[150]

If, despite the Commission's expert prediction, common carriers are adversely affected by the exemption from tariff filing, the agency can take action when the threat materializes. "[A]t this point, the litany of horrors presented by petitioners represents no more than convenient

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24388 (June 1, 1983). This exemption permits contract carriers to change rates with no regulatory delay. The proposal here, while not eliminating all filing requirements for common carriers, will nonetheless greatly reduce regulatory burdens on these carriers and enhance their competitive opportunity.

Short Notice Effectiveness for Independently Filed Motor Carriers and Freight Forwarded Rates, 48 Fed.Reg. 34,307, 34,308 (1983) (Ex Parte No. MC-170) (notice of proposed rulemaking).

[149] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 159; *see id.* ("The better approach is to search for ways to relieve any unnecessary regulatory burdens from all transportation sectors."); *id.* at 167-68 (Andre, Comm'r, concurring).

[150] *Cf. Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 159 ("To the extent that these burdens cannot be lifted identically, it is because of the distinct treatment of these two sectors in the act."). Congress imposed tariff-filing requirements by statute and did not allow exemption in the belief that such requirements are necessary to ensure that common carriers live up to their "common carrier obligation" and publish non-discriminatory rates covering all of the services they hold out. *See* 49 U.S.C. § 10741 (1982).

Petitioners assert that the advocates of authority to haul contract and common carriage represented that they would rely on tariff-filing requirements to enforce the Motor Carrier Act's prohibition against discrimination among shippers engaged in common carriage. Whatever the force of that argument in gaining passage of dual operating authority, there is no evidence that Congress relied on tariff publication as a precondition to passage of dual operating authority and the Commission has provided a reasoned explanation why such protection is not necessary now.

speculation designed to restore the comfortable *status quo* that existed before the 1980 Act." [151]

b. *Unlawful discrimination*

Unlike common carriers, contract carriers can discriminate among shippers. They are not subject to the anti-discrimination provisions or the proscription against unreasonably high rates.[152]

Petitioners fear that contract carriers holding authority to transport common carriage, once exempted from tariff filing, will be able to discriminate among shippers of common carriage. We do not see this disparate treatment as a realistic possibility. In one suggested scenario, a motor carrier operating as both a common and a contract carrier negotiates noncompensatory contract rates with a favored shipper and charges high common carrier tariff rates to other similarly situated (but disfavored) shippers. The discriminating carrier, however, cannot exact high common carrier rates from shippers who ex hypothesi are similarly situated with a shipper obtaining low contract rates, because they too could get low rates from other contract carriers. As the Commission pointed out, "[w]ith or without contract carrier tariffs the competition from other carriers will continue to protect common carrier shippers from unreasonably high prices." [153]

In addition, this scenario is realistic only if the noncompensatory contract rate remains secret, because the discriminating carrier must conceal his unlawfully low rate. But a contract carrier may attempt to conceal his rates now simply by publishing nominally nondiscrimina-

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[151] Joint Brief for the Interstate Commerce Commission and the United States of America at 39, Nos. 83-1581, 83-1740, 83-1761 & 83-1973.

[152] *See* 49 U.S.C. §§ 10704(c), 10741(b) (1982).

[153] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 160.

tory rates and altering the service provided to effect the discriminatory treatment. In fact, as demonstrated above, the Commission and aggrieved carriers can expose discriminatory rates even when tariffs are not published.[154]

In a second scenario, a carrier transporting both common and contract carriage negotiates low (possibly noncompensatory) contract rates with a shipper as the quid pro quo for a specific amount of common carriage. This scenario fails to reveal any unlawful discrimination among shippers of common carriage. Moreover, the scheme presumes—unrealistically, as we have seen—that the contractual terms will remain secret. If the contract rates were not compensatory (or if the facts suggested unlawful tying under the antitrust laws), then the Interstate Commerce Commission, the Federal Trade Commission, and aggrieved carriers all have the proven ability to expose the unlawful conduct and bring the law-breaker to justice. Reassuringly, the Commission here points out that it "has been issuing tariff filing exemptions on an individual basis for some time without the occurence [sic] of any notable harm." [155]

2. *Tariff filing is burdensome*

In light of the negligible benefits of tariff filing, the Commission found justification for its broad exemption in the cost of rate publication, the delay necessitated by the provision that rates take effect only after thirty days, and the inhibition of innovative price/service options. We scrutinize each justification in turn.

a. *Cost*

The Commission found as a fact that "eliminating the preparation and filing of tariffs will result in substantial cost savings" which may be passed on to consumers in the form of lower prices for goods and services.[156] The

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[154] *See id.* at 160.

[155] *Id.*

[156] *Id.* at 157.

principal direct savings inure to the exempted contract carriers. One large carrier estimated that the cost of preparing and publishing rate schedules totalled over $40,000 annually.[157] The Commission recognized that "[f]or smaller, less profitable carriers . . . the expense of continued tariff filing could be prohibitive." [158] Savings should also be realized by the agency. According to concurring Commissioner Andre: "More than 66,000 contract tariffs were filed last year. . . . If the total cost per tariff [to the private and public sectors] is no more than $[illegible], then tens of millions are expended annually on paperwork alone." [159]

Petitioners have a point when they observe that these costs are not a large percentage of gross revenues or even of profit for most carriers.[160] What this analysis ignores, however, is that the benefits of policy change must be weighed against the costs. Even a small cost is sufficient to justify regulatory change if the benefits of existing regulation are nonexistent. That is the essence of the Commission's judgment here,[161] and we find ample record evidence to support it.[162]

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[157] *See id.*

[158] *Id.*

[159] *Id.* at 163 (Andre, Comm'r, concurring).

[160] Petitioners' insistence that tariff filing is more a nuisance than a substantial cost is belied by their assertion that unilateral tariff filing would put common carriers at a severe competitive disadvantage. *See supra* p. 43.

[161] *See Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 157 n. 13 ("We conclude that the costs are not justified by the benefits and that relief is thus appropraite [sic]."); *id.* at 164 (Andre, Comm'r, concurring) ("Whatever the arguable range of the costs thus incurred, the sums are clearly not trivial. The question that then arises is this: what are the public benefits that warrants the continued imposition of nontrivial costs on the transportation system? The answer is that there are none.").

[162] *See* JDA at 8-9 & n. 22, 45-50, 96, 98, 103, 112-13, 122, 129-30, 144 (comments by Federal Trade Commission, Small Business Administration, and various contract carriers).

b. *Delay*

The Commission concluded that exemption from tariff filing will give contract carriers "the enhanced flexibility to respond quickly to market signals." [163] As it now stands, contract carriers must languish thirty days after filing a tariff before the new rate can go into effect.[164]

It is an incomplete answer to say that the Commission may allow tariffs to become effective on short notice. The existing short notice provision is available only "if cause exists in particular instances or . . . [in] special circumstances." [165] The Commission by regulation interprets this phrase to mean "actual emergency and real merit." [166] If there is doubt as to the meaning of this latter phrase, the very next sentence provides that "[c]ommercial competition or the desire to meet the rates of a competing carrier that his given statutory notice for reduced rates or for the establishment of new rates and charges will not of itself be regarded as cause for permitting changes in rates or other provision on less than statutory notice."[167] Of course, the Commission could propose an across-the-board reduction in the notice period, but the agency explicitly considered that and similar approaches and was "not persuaded that the alternatives which have been suggested offer any substantial benefit to the public since each proposal would still entail significant paperwork and delay. This would thwart the shippers' need

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[163] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 157-58.

[164] *See* 49 U.S.C. § 10762(a)(2) (1982).

[165] *Id.* § 10762(d)(1).

[166] 49 C.F.R. § 1307.6(a) (1982), *removed, Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 48 Fed.Reg. 24,388, 24,390 (1983) (codified at 49 C.F.R. § 1307.0 (1983)), *removed, Revision of Tariff Regulations, all Carriers*, 49 Fed.Reg. 38,614, 38,641 (1984).

[167] *Id.*

for immediate service and carriers' needs to compete in a changing marketplace." [168] We find sufficient record evidence to support the Commission's findings.[169]

c. *Inhibition of innovative price/service options*

As a final benefit, the Commission posits that the exemption will allow contract carriers "to tailor their service and price options to the individual and varying needs of their contract shippers." [170]

Petitioners argue that "service and price options" is an empty phrase. This accusation overlooks the Commission's example of "innovative pricing techniques," admittedly provided in the agency's discussion of household goods transport, of "service based on binding written estimates rather than actual weights and tariff rates." [171] In the current environment each experiment carries with it the need to prepare a tariff and wait thirty days before carrying it out. The Commission's expectation of innovation upon removal of these restrictions is eminently sensible. Absent any specific refutation by petitioners, we accept the agency's expert judgment.

3. *The request for continued application of tariff-filing requirements to contract carriers of household goods*

Petitioner Household Goods Carriers' Bureau, Inc. as-

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[168] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 157 n. 12 (1983) (Ex Parte No. MC-165).

[169] *See* JDA at 8, 91, 114, 221 (comments by Federal Trade Commission, a shipper of contract carriage, and two contract carriers); Supplemental Joint App. at 28, 33 (comments by two shippers of contract carriage).

[170] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. at 157.

[171] *Id.* at 161.

serts that the Commission's decision to exempt household goods carriers from the tariff-filing requirements contravenes the Household Goods Transportation Act of 1980.[172] It contends that exemption leaves unsophisticated consumers negotiating shipment of a lifetime's possessions at the mercy of unscrupulous carriers. According to the Bureau, Congress recognized that individual consumers, due to the infrequent and episodic nature of their shipping needs and the extraordinary subjective value of household belongings, are easy prey for dishonest carriers.[173]

The Households Goods Transportation Act of 1980 defines three categories of "household goods." Roughly stated, these three categories consist of household belongings ("first proviso" goods),[174] business fixtures and furnishings ("second proviso" goods),[175] and articles requiring delicate means of transport ("third proviso" goods).[176]

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[172] Pub. L. No. 96-454, 94 Stat. 2011 (codified at scattered sections of 49 U.S.C.).

[173] *See* H.R. REP. No. 1372, 96th Cong., 2d Sess. 2, 5-6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4271, 4272, 4275.

[174] *See* Household Goods Transportation Act of 1980, Pub. L. No. 96-454, § 3(a)(1), 94 Stat. 2011, 2011-12 (codified at 49 U.S.C. § 10102(11)(A) (1982)) (defining "household goods" to mean "personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwelling and such other similar property as the Commission may provide by regulation.").

[175] *See id.*, 94 Stat. at 2012 (codified at 49 U.S.C. § 10102(11)(B)) (defining "household goods" to mean "furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals or other establishments when a part of the stock, equipment, or supply of such stores, offices, museums, institutions, hospitals, or other establishments and such other similar property as the Commission may provide by regulation.").

[176] *See id.*, 94 Stat. at 2012 (codified at 49 U.S.C. § 10102(11)(C)) (defining "household goods" to mean "articles, including objects of art, displays, and exhibits, which because of their unusual nature

The Commission's rationale for including contract carriers of household goods in its broad exemption—although perfectly valid at the time of the Commission's decision—has been overtaken by events. During this court's deliberations, the Commission adopted a "policy statement" permitting contract carriers to serve an industry or industries as a class.[177] Under this decision, contract carriers might conceivably serve the entire "household goods carriage industry." Moreover, because these carriers are *contract* carriers, they would be exempt from tariff-filing requirements pursuant to the Commission's decision challenged here. Candidly, the Commission concedes that "broad contract authority would have an impact on the Commission's ability to enforce consumer protection regulation." [178]

Although changes in material circumstances ordinarily call for vacating an agency's decision and remanding for reconsideration, that time-honored procedure is not ap-

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or value require the specialized handling and equipment usually employed in moving household goods and such other similar articles as the Commission may provide by regulation.").

Although designed to protect consumers, the Household Goods Transportation Act of 1980 was passed by the same Congress that passed the Motor Carrier Act of 1980 (which evinced a marked distrust of regulation). Of particular importance to this petition, "section 4[(a) of the Household Goods Transportation Act, 49 U.S.C. § 10734(a)(1) (1982)] . . . indicates that household goods carriers are subject to the provisions of 49 U.S.C. 10762, including its exemption provisions." *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150, 161 (1983) (Ex Parte No. MC-165).

[177] *See Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Industry-Wide Service*, 133 M.C.C. 298, 303 (served 28 Dec. 1983) (Ex Parte No. MC-165 (Sub-No. 1)), *petition for review dismissed as not ripe sub nom. American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 747 F.2d 787 (D.C. Cir. 1984).

[178] *Id.* at 302.

propriate for this petition. Remanding to the agency will not promote respect for the agency as "primary decision-maker," [179] because the Commission's industry-wide service decision already contains a full discussion of the ramifications of that decision for enforcement of consumer protection regulations.[180] Nor will failure to remand prejudice petitioner Household Goods Carriers' Bureau; it was a party to the Commission's industry-wide service decision as well as the tariff-exemption reviewed here.[181] Indeed, petitioner's brief in this case anticipated the Commission's industry-wide service decision.[182] Not surprisingly, our reading of the Commission's published industry-wide service decision reveals a close resemblance between petitioner's arguments in that case and its contentions herein.

Without passing on the merits of any challenge to the Commission's industry-wide service decision, and relying solely on the points and authorities contained in the record before us, we hold that the Commission's exemption of household goods contract carriers from tariff-filing requirements is not contrary to law. The Commission's exemption does not strip individual shippers of household belongings of protections mandated by the Household Goods Transportation Act.

As a factual matter, the consumers that the new law was most concerned about—unsophisticated individual shippers who ship household goods only occasionally—do not negotiate rates and service directly with contract carriers. By statutory definition, contract carriage involves

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[179] *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1326 n. 240 (D.C. Cir. 1984).

[180] *See Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Industry-Wide Service*, 133 M.C.C. at 299-300, 301-02.

[181] *See id.* at 304.

[182] *See* Brief for Petitioner at 7 n. 4, No. 83-1740.

"continuing agreements" [183]; individual shippers of household goods do not maintain ongoing contractual obligations for carriage of their household goods. According to the Commission, this requirement is not relaxed now that contract carriers have authority to render service to an entire industry: "We emphasize, however, that we do not propose to authorize indiscriminate service to any shipper within a class. Rather, shippers in the class must actually enter into continuing contracts with the carrier." [184] Thus, individual shipers should be unaffected by the Commission's exemption. Corporate and government shippers, who deal with contract carriers of household goods on behalf of their employees, do not need the protections Congress designed for "consumer shippers."

The Commission's regulations bear out this distinction between consumer and corporate/government shippers of household goods. The requirements relating to written estimates, notification of charges, advertising, and so forth apply only to "first proviso" goods—the personal belongings one might expect consumers to ship themselves. "Second and third proviso" goods—the business fixtures and furnishings and articles requiring delicate means of transport one would expect corporations and governments to ship—are explicitly exempted from the Commission's regulation.[185] In the Commission's words,

> grants of contract authority for household goods carriers have been historically limited to commercial accounts . . . These authorizations normally would only involve movements of "second and third proviso" household goods. As such, the regulations . . . which

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[183] *See* 49 U.S.C. § 10102(14)(B) (1982).

[184] *Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Industry-Wide Service*, 133 M.C.C. at 301.

[185] *See* 49 C.F.R. § 1056.1(b)(1) (1984).

protect individual shipers of "first proviso" household goods, would not apply.[186]

In sum, "household goods" shipped under contract turn out to consist almost entirely of goods shipped by businesses and governments. Household items ordinarily shipped by unsophisticated consumers are shipped by common carrier. Even after the Commission's exemption and decision to authorize industry-wide service, these latter goods remain fully subject to the Commission's consumer protection regulations. And of course, petitioners may challenge the bona fides of any contract carrier serving individual consumer shippers in contravention of the 1980 Act.[187]

VI. Conclusion

According the tariff-filing exemptions the scope suggested by the facial breadth of their terms—and interpreting them in light of the recently amended national transportation policy, which seeks to promote competition and prune unnecessary federal regulation and which is incorporated in the exemption provisions by reference—we affirm the Interstate Commerce Commission's decision to relieve all motor contract carriers of property from the requirement to file tariffs. The Commission's order is

Affirmed.

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[186] *Motor Contract Carriers of Property—Proposal to Allow Issuance of Permits Authorizing Industry-Wide Service*, 133 M.C.C. at 302. (citations omitted).

[187] *See* 49 U.S.C. § 10925(e) (1982); *Global Van Lines, Inc. v. Interstate Commerce Comm'n*, 704 F.2d 829, 833-34 (5th Cir. 1983).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1581

CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INC., *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents

REGULAR COMMON CARRIER CONFERENCE, INC., *et al.*,
Intervenors

And Consolidated Cases Nos. 83-1740 & 83-1761

[Filed Mar. 29, 1985]

Before WRIGHT and SCALIA, Circuit Judges.

ORDER

It is ORDERED by the court, *sua sponte*, that the *per curiam* opinion filed March 19, 1985 be, and is hereby, amended as follows:

> On page 19, footnote 60, delete the first sentence and the first word of the second sentence of the second paragraph; initial capitalize the second word of the second sentence of that paragraph.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-165

EXEMPTION OF MOTOR CONTRACT CARRIERS
FROM TARIFF FILING REQUIREMENTS
(49 CFR Parts 1162 and 1307)

Decided May 17, 1983

Title 49 CFR Parts 1162 and 1307 are amended to relieve all motor contract carriers of property from tariff filing requirements. Exemption of motor contract carriers of property is consistent with the public interest and the national transportation policy of 49 U.S.C. 10101. The Commission will not grant a similar exemption to contract carriers of passengers at this time.

DECISION

BY THE COMMISSION:

BACKGROUND OF THE PROCEEDING

The Contract Carrier Conference of the American Trucking Associations (Conference) has filed an application requesting that the Commission exempt, under 49 U.S.C. 10702(b), 10761(b) and 10762(f), all motor contract carriers of property from the tariff filing requirements of the Interstate Commerce Act (the act). Other parties (the Federal Trade Commission; Carnaco, Inc., a contract carrier of property; and United Forwarding, Inc., a freight forwarder that uses contract carriers) filed applications seeking similar relief. We determined that the Conference was a proper party to file an application and instituted this proceeding by a notice of

proposed rules (47 F.R. 57303, December 23, 1982) seeking comments on whether our tariff filing regulations, 49 CFR parts 1162 and 1307, should be amended to exempt contract carriers of property. We also proposed to amend 49 CFR part 1306 to exempt contract carriers of passengers because the rationale presented for exempting property carriers appeared to apply equally to passenger carriers.

In addition, we denied a petition by the Regular Common Carrier Conference of the American Trucking Associations (RCCC) requesting a rulemaking to determine the criteria to be used in granting individual petitions for exemption or to broaden this proceeding to include such a determination. We found that the issues raised by RCCC's petition would be moot if the exemption of all contract carriers was granted. RCCC's pleading was accepted into the record as a comment in opposition to the proposal.

Comments were received from more than 80 parties. Several parties filed reply comments. The comments have been carefully considered, and a general summary of the comments follow. The final rules we are adopting are set forth in the appendix.

Preliminary Issues

The RCCC has filed a petition for reconsideration of our denial of its petition for a rulemaking looking toward establishing criteria for individual applications. It argues that our denial of its petition prejudges the Conference's application.

RCCC's petition for reconsideration will be denied. We initiated this proceeding because of our tentative determination that the Conference's application had merit and could well result in a broad tariff exemption for the contract carrier industry. Under those circumstances, a proceeding looking toward standards for individual re-

lief would have been imprudent. And given our ultimate conclusion that a broad exemption is in the public interest, such a proceeding would be particularly inappropriate.

Several parties, including the Specialized Carriers & Rigging Association (Specialized Carriers) and the Motor Carrier Rate Bureaus[1] (rate bureaus), assert that our notice impeded full public participation because it failed to provide cross-service of pleadings on all interested persons. They request that the proceeding be discontinued or, in the alternative, that cross-service be ordered and a period provided for filing additional comments. The rate bureaus also request an oral hearing for the purpose of cross-examining several witnesses which favor the proposed exemption.

The request for cross-service and authorization to file further comments is denied. In the first place, the essential issues were clearly identified in the initial notice. But more importantly, this rulemaking is not an adjudicatory proceeding between private litigants. Rather, it proposed the adoption of a "statement of general applicability and future effect"[2] and is thus governed by the informal rulemaking procedures of section 553 of the Administrative Procedure Act. Section 553 provides that before a rule may be adopted notice must be provided and interested parties given an opportunity to submit comments. There is no requirement for cross-service.[3]

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[1] Representing the members of the Central States Motor Freight Bureau, Inc., Central & Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, Middlewest Motor Freight Bureau, National Motor Freight Traffic Association, Inc., New England Motor Rate Bureau, Inc., Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, and Rocky Mountain Motor Tariff Bureau, Inc.

[2] 5 U.S.C. 551(4).

[3] We did, however, direct parties to serve their comments on the law firm representing the rate bureaus and the Specialized Carriers, and we note that both of those parties filed reply comments.

Further, we provided sufficient time for the filing of replies (including an extension) so that we could make the entire public recored available to interested parties at our offices. We conclude that our notice of proposed rules complied with the requirements of section 553.

We also find that an oral hearing for cross-examination is unnecessary. The issues raised by the rate bureaus, primarily involving a dispute over the cost of preparing tariffs, can be resolved upon the present record. The request for oral hearing is denied.

Passenger Carrier Exemption

The American Bus Association (ABA) argues that the proposed rules exceed the Commission's exemption authority. It notes that each of the three statutory exemption provisions [4] contains the following language:

> The Commission may begin a proceeding * * * on application of a contract carrier or group of contract carriers * * *.

The ABA argues that an application requesting exemption of contract carriers of passengers has not been filed and requests that this proceeding, insofar as it relates to passenger carriers, should be discontinued.

We are not fully convinced by ABA's interpretation of our authority. However, as the only comments filed regarding passenger carriers requested that they be excluded from the proposal we will not extend the exemption to them at this time. Of course, passenger carriers may file for individual exemptions and we are willing to entertain a petition for a general exemption at any time. Further references in this proceeding to "contract carriers" relate to contract carriers of property only.

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[4] 49 U.S.C. 10702(b), 10761(b) and 10762(f).

Breadth of the Proposal

A number of parties, including the rate bureaus, RCCC, and (jointly) Global Van Lines, Inc. and Wheaton Van Lines, Inc., argue that the Commission does not have authority to grant blanket relief under the involved statutory provisions.[5] In general, these parties assert that, since the act establishes a general rule that contract carriers must file tariffs, the Commission cannot establish a general rule that such carriers need not file tariffs.

The argument that a broad exemption is illegal because the act directs that the nonexempt rates of contract carriers be regulated is without merit. The statute does not limit the number of carriers that may be exempted. Of course, the natural effect of any exemption is to supersede otherwise applicable regulatory constraints. But the question is not whether the various statutory provisions would apply absent an exemption, but whether the services at issue meet the statutory criteria for exemption. *American Trucking Associations v. I.C.C.*, 656 F. 2d 1115, 1122-23 (5th Cir. 1981) (*ATA*). The statutory criteria simply require a finding that relief (here, a broad tariff exemption) is in the public interest and consistent with the national transportation policy. Because we believe that such a finding is warranted here, we will grant broad relief from the otherwise applicable tariff requirements for all contract carriers of property.

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[5] Several parties have claimed that the Conference is not a "contract carrier or group of carriers" but is instead a trade association. They assert, therefore, that the Conference is not a proper party to apply for an exemption. This argument is without merit. The Conference represents the interests of a broad group of contract carriers and is well suited to file an application for exemption of all such carriers. A similar conclusion was reached in *Armored Carrier Corp. Petition for Relief, Section 218(a)*, 303 I.C.C. 781 (1958), where an association of 16 carriers was found to have standing to apply on behalf of its members.

Overview of the Comments

The commentors are split along predictable lines. The contract carrier interests, most shippers, and the participating governmental agencies—the Federal Trade Commission (FTC), Department of Transportation (DOT), and Small Business Administration (SBA)—support the requested relief, asserting that it will promote the public interest by enhancing competitive pricing and reducing the costly and time-consuming paperwork burdens associated with the current tariff filing requirements. They argue that tariffs are not necessary given the unique operations of contract carriers and the competitive nature of the motor carrier industry. The common carrier interests oppose the requested relief, claiming that it will eliminate regulatory protections to which they believe they are entitled and will destroy competition by permitting "secret pricing" and predatory ratemaking.

We will discuss a few of the representative comments supporting and opposing the exemption. We will then explain our reasons for granting a broad exemption.

Representative Comments in Support

DOT argues that the transportation industry has changed dramatically since the tariff filing requirements for contract carriers were adopted in 1957, and that the existence of relaxed entry standards, innovative pricing and service, and an increased reliance on market forces compels the conclusion that the public interest no longer requires contract carriers to file tariffs. DOT argues that the Motor Carrier Act of 1980[6] (Motor Carrier Act) established increased competition as a primary element of the national transportation policy and that tariff filing rules artifically hinder the ability of contract carriers to compete and respond to market changes.

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[6] Public Law 96-296, 94 Stat. 793 (1980).

Three Way Corporation (Three Way), a contract carrier, asserts that tariff filing for contract carriers is a relic of the protective scheme of regulation envisioned in 1935 that ignores the profound changes in the transportation industry since that time. Three Way contends that tariff filing inhibits contract carriers from meeting customer needs and competing with the changing price and service offerings of other carriers. It asserts that the public can only benefit from industrywide exemption.

The National Industrial Transportation League (NITL) an organization representing approximately 1,500 large and small shippers, argues that the exemption of contract carriers would provide competitive and efficient service to the public by allowing contract carriers to respond quickly to shipper needs. Other shippers filed similar expressions of support. NITL argues that rate flexibility is particularly important since the Commission has deregulated rail TOFC/COFC transportation, which is competitive with motor service.[7]

Three household goods carriers, Allied Van Lines, Inc. (Allied), North American Van Lines, Inc. (North American), and Electronics Van have filed separate comments in support of the proposed exemption. Allied argues that shippers generally consider the contract itself to be the primary document describing the rates and service to be provided, and that the preparation of tariffs is a redundant and unnecessary expense. Allied asserts that the proposed exemption will not harm the potential competitors of contract carriers because these competitors can go to the customer, ask what it is paying for service, and offer a competitive price.[8] North American asserts

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[7] *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981). That exemption decision was essentially affirmed in *ATA*, *supra*.

[8] Given the nature of contract carriage, in which many of the essential terms of the carrier's undertaking are in the private contract and not the public tariff, it appears that a carrier truly in-

that a shipper should not be required to wait 30 days to realize any benefit from a contract with a contract carrier, but that the benefits of a negotiated rate should promptly inure to both contracting parties. Electronics Van suggests that, as a small carrier, it will be unable to afford the long-term costs of continued tariff publication.

Refrigerated International Cargo Haulers (RICH), among others, argues that the publishing costs and regulatory burdens of tariff filing detract from the benefits of contract carriage both to the carrier and to the public and interfere with the ongoing commercial relationship between a contract carrier and shipper. RICH states that it has lost business in the past when shippers were unable or unwilling to wait for a new tariff to become effective. RICH contends that the exemption would further the current legislative goals of competition and efficiency rather than continue the protectionist policies of years long past.

Representative Comments in Opposition

The principal argument by the common carrier opponents is that the proposed exemption would place them at a competitive disadvantage contrary to the purposes of the act. The rate bureaus and other parties point to the legislative history of the 1957 amendment to former section 218(a) that required contract carriers to file their actual rates instead of only the minimum rates previously required. The Senate Report noted that one of the underlying purposes of contract carrier regulation was protection of common carriers and that such protection was incomplete unless common carriers knew the actual rates charged by their contract carrier competitors.[9] The rate

terested in offering a competitive service would have to contact the shipper regardless of whether tariffs are filed.

[9] See S. Rept. 335, 85th Cong., 1st sess. 2 (1957). See also H.R. Rept. 895, 85th Cong., 1st sess. 2 (1957).

bureaus argue that the Motor Carrier Act did not disturb this legislative policy or otherwise permit contract carriers and shippers to strike secret deals and frustrate common carrier attempts to compete. RCCC raises similar arguments about competitive inequality and the Commission's inability to detect and correct predatory contract carrier practices.

The National Small Shipments Traffic Conference, Inc. and the Drug & Toilet Preparation Traffic Conference, Inc. (collectively NASSTRAC) oppose a blanket exemption of contract carriers. They argue that the exemption would be anticompetitive because it would reduce the amount of information available about rates. In their view, knowledge of rates increases competition. They also contend that the elimination of contract carrier tariffs would impede the ability of interested persons to protest contract carrier rates.

NASSTRAC asserts that the exemption would lead to unlawful discrimination, especially by dual operators, because carriers holding both common and contract authority could agree to undisclosed noncompensatory contract rates on one segment of traffic while charging high common carrier tariffs rates to other similarly placed shippers. These parties suggest that, rather than exempting all contract carriers, the Commission exempt only those contract carriers that do not compete with common carriers—for example those serving as "house" carriers for affiliated shippers or those such as armored car carriers that perform unique services not offered by common carriers. They particularly urge that no exemption be granted to carriers holding dual authority.

Two meatpackers, Geo. A. Hormel & Co. and The Rath Packing Company, argue, among other things, that the burdens contract carriers complained about concerning tariffs are not attributable solely to filing requirements, but rather are part of the efforts of all carriers to market their services. These burdens would, they contend, con-

tinue regardless of filing requirements. The meatpackers also argue that tariffs are an important protection against carrier abuse because the shipper can complain to the Commission if a tariff is violated. Without tariffs a contract shipper would have to resort to the court system for enforcement of the contract, rather than using the Commission's less expensive complaint procedures. They suggest that, if some change is required in contract carrier tariff filing requirements, it be limited to reducing the current 30-day notice period to 10 or 15 days. This would continue the protections shippers enjoy while improving the ability of contract carriers to respond to changing market conditions.

The Household Goods Carriers' Bureau, Inc., and Global Van Lines, Inc., jointly with Wheaton Van Lines, Inc., have filed separate comments opposing the proposed exemption. They contend generally that the exemption is not in the public interest and will contravene the Household Goods Transportation Act of 1980.[10] They argue that contract rates will become so low as to result in discrimination against noncontract shippers or individual consumer shippers. They contend that Congress intended that all motor carriers of household goods, whether common or contract, be regulated to protect the interests of consumers, and that no exemption should be granted to contract carriers of household goods.[11]

Discussion and Conclusions

The provisions of 49 U.S.C. 10702(b), 10761(b), and 10762(f) give the Commission broad discretion to relieve motor contract carriers from the requirement that they

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[10] Public Law 96-454, 94 Stat. 2011 (1980).

[11] As indicated, other household goods carriers vigorously support the proposal. They cite their favorable experience under individual exemptions and desire the broad relief proposed here to cover all future operations.

file tariffs if such relief is consistent with the public interest and the national transportation policy of 49 U.S.C. 10101. In initiating this proceeding, we tentatively concluded that exempting all contract carriers from the otherwise applicable tariff requirements would promote the public interest and the national transportation policy. We noted the Conference's arguments that tariff filing for contract carriers was burdensome and expensive and that it hampered a carrier's ability to respond quickly to marketplace forces; that shippers and competing carriers no longer need the pervasive regulatory protection represented by the tariff filing requirements for contract carriers; and that even under the present regulatory system requiring publication of the contract rate, shippers or competitors obtain at best an incomplete picture of existing price and service arrangements.

The comments support our preliminary conclusions.[12] Accordingly, we will grant the proposed exemption for all contract carriers of property.

An Exemption Serves The Public Interest

The public interest lies in ready access to competitive, efficient, and reasonably priced motor carrier service when and where needed. Freeing contract carriers from the requirements of the tariff filing system will promote competitive pricing by allowing them to tailor their service

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[12] Several alternatives to a blanket exemption were offered, most notably proposals that the notice period be shortened from 30 to 10 or 15 days or that contract carriers submit their contracts for public scrutiny. We are not persuaded that the alternatives which have been suggested offer any substantial benefit to the public since each proposal would still entail significant paperwork and delay. This would thwart the shippers' need for immediate service and carriers' needs to compete in a changing marketplace.

Other parties suggested that both common and contract carriers be exempted. However, we lack a general exemption power in the common carrier area comparable to that in the contract carrier area.

and price options to the individual and varying needs of their contract shippers. Further, eliminating the preparation and filing of tariffs will result in substantial cost savings.[13]

For example, North American estimates that an exemption would cut in half the time devoted to the preparation of contract tariffs and would substantially reduce its publication costs. Such savings, which can be passed on to the consumer in the form of reduced rates, are estimated at over $40,000 per year for this carrier alone. As indicated by the Conference in its exemption petition (and by other carriers such as RICH), many contract carriers would realize similar savings. National Freight Lines suggests that the time and costs spent on tariff publication could be used more productively in areas such as sales, financial and operational planning. For smaller, less profitable carriers such as Electronics Van and Cresco Lines, Inc., the expense of continued tariff filing could be prohibitive. The resulting cost savings and the enhanced flexibility to respond quickly to market signals establish that a broad exemption is in the public interest.

The Arguments In Opposition

We will now address the salient comments in opposition to the requested relief and explain why they do not persuade us that the exemption application should be denied.

a. *The 1957 legislation.*—Some of the opponents of the exemption claim that the 1957 amendment to the act (which required contract carriers that are not exempt to

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[13] The rate bureaus have requested an oral hearing to develop further information on the exact cost of the existing tariff requirements. In our view, it is both unnecessary and impossible to establish with precision the costs of filing tariffs. What is clear is that the costs are substantial and that unless the tariffs serve a corresponding substantial public benefit they are unjustified. We conclude that the costs are not justified by the benefits and that relief is thus appropraite.

file tariffs) prevents us from granting an industrywide exemption. We disagree. The 1957 amendment required that contract tariffs show actual, and not simply minimum rates. But it did not alter the long-effective provision allowing the Commission to exempt any (or all) contract service from the tariff requirements when exemption would be in the public interest.[14]

We recognize that one of the purposes of the 1957 legislation, which was initiated by the Commission, may have been to protect common carriers from competition from contract carriers and that public availability of competitors' rates was one of the ingredients of that protection. But a quarter of a century has elapsed since then, and many of the assumptions underlying the role of transportation regulation have substantially changed.

Whatever may have been the goals of rate regulation in 1957, the Motor Carrier Act has revised the act to mandate enhanced competition and efficiency. We think it is beyond question that the elimination of the tariff filing requirement will promote both aspects of this goal. The threat of new entry and freedom over prices and services are at the core of the new regulatory scheme. The action taken here will simplify new entry since it will eliminate the delay that accompanies the filing of tariffs for new contract customers. Similarly, carrier and shipper willingness to experiment with new price/service options will not be dampened by the burdensome need to reflect each such change in an additional tariff filing.[15]

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[14] Congress was aware in 1957 of the continued vitality of the exemption provision. See the House Report at 6; see also the Senate Report at 4.

[15] Some parties have argued that the open publication of rates promotes competition, while nonpublic, "secret" pricing inhibits it. Experts can disagree on this proposition. See *Great A&P Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979). But we think that two points can be made with some certainty. First, there is no statutory requirement that contract tariffs include all the particulars of the proffered

b. *Disparate regulatory burdens.*—Some of the parties have argued that an exemption will lead to uneven regulation of contract and common carriers and will encourage common carriers to convert to contract carriage.[16] As a consequence, we are asked to continue in place the regulatory burden that, by opponents' admission, tariff filing places on contract carriage. Whether or not the diagnosis is correct, the remedy is an unappealing request for equality of disadvantage. The better approach is to search for ways to relieve any unnecessary regulatory burdens from all transportation sectors. To the extent that these burdens cannot be lifted identically, it is because of the

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service, and indeed it is unlikely that they could. See 49 U.S.C. 10762(a)(1). Consequently, the easy price comparison that is the foundation of the open price argument has never been a real possibility. Second, the posting of prices that we are here concerned with takes place in the context of rules that impose additional cost and delay in effecting price changes. These rules provide for the possibility of a legal challenge to the posted prices, wholly apart from their acceptability in the marketplace. Given these facts, and considering the demonstrated competitive vigor in the already exempt trucking sectors, we believe that disinterested experts would agree that elimination of the tariff requirement will enhance competition. The support of the FTC for the proposed exemption is strong evidence that our belief is correct.

[16] At the extreme, this argument is taken to show that the demise of the common carrier system is a risk involved in the proposed action. Despite its exaggerated nature, there is a kernel of truth to the claim: to the extent that there is a measurable gain in the efficiency of the contract carrier sector, there may be some change in market share and some increase in the conversion to contract carriage. However, the demise of common carriage and the loss of service to small shippers hardly follows. The conversions will take place in marginal areas where contract carriage is already a possibility. Service on-demand to the occasional shipper will remain a huge part of the market, and the case with which the trucking business can be entered assures that coverting carriers will be replaced without meaningful disruption. Consequently, it would be contrary to the public interest to forego the gains that will come of tariff elimination just to forestall the possibility of some conversion from common to contract carriage.

distinct treatment of these two sectors in the act. We view our principal responsibility here to be that of predicting whether any dissimilarity of treatment will have a negative effect on the shipping public and the public interest generally. While this is not totally divorced from consideration of the impact on identifiable competitors, it is obviously a much larger concern, one that permits and may even welcome some distress in existing competitive relationships. In short, if conversions do take place they will be a measure of the increase in competitive efficiency that has occurred.

c. *Dual operations.*—Some of the commentors have suggested that it is inappropriate to exempt contract carriers which also serve the public as common carriers. The Motor Carrier Act amended 49 U.S.C. 10930(a) to eliminate restrictions on carriers operating in both a common and contract carrier capacity. Obviously, in permitting such dual operations Congress believed that the increased availability of common carrier services would keep rates reasonable.[17] A tariff exemption does not undermine that premise. With or without contract carrier tariffs, the competition from other carriers will continue to protect common carrier shippers from unreasonably high prices.

Nevertheless, the argument is made that dual operators will be in a particularly advantageous position to discriminate among customers, granting contracts to favored accounts and charging higher common carriage rates to the less fortunate. "Secret" contract rates are apparently the key to this strategy, since all other aspects of dual carriage exist and the Commission is unaware of an existing problem. But in effect, secret rates already exist in

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[17] Indeed, the Commission reached such a conclusion in Ex Parte No. 55 (Sub-No. 77), *Dual Operations of Motor Carriers*, 43 F.R. 14664 (April 7, 1978). The Commission's decision was noted with approval by the drafters of the new legislation when they approved dual operations in the Motor Carrier Act. See H.R. Rept. 1069, 96th Cong., 2d sess. 23 (1980).

the sense that shippers using dual operators are very unlikely to have researched the carriers' existing contracts, and even if a shipper did, it would be faced with the less than full disclosure problem alluded to above. Yet there is no evidence of any existing problem, nor is a problem likely to develop. There is just simply too much competition for the shipper's business. Dissatisfied shippers no longer have to rely on regulatory relief.

Carving out a dual operator's exception to the tariff exemption would have a devastating effect on the usefulness of the exemption, as dual operators are a large part of this market and likely to increase in the future. Naturally, a claim of potential discrimination raises public interest issues, but we would note that contract carriers are now permitted by statute to offer different rates and services to similarly situated shippers. Thus, shippers using contract, as opposed to common carriage cannot be heard to claim discrimination or preference. While the same cannot be said of shippers using common carriage, the Commission has been issuing tariff filing exemptions on an individual basis for some time without the occurence of any notable harm.

d. *Predation.*—Some of the opponents argue that broad contract carrier tariff relief will result in widespread predation that will be harmful to the long term interests of both shippers and carriers. We disagree.

Predation, as commonly understood, is pricing below cost for the purpose of driving rivals out of a market and recouping the losses through higher profits earned later in the absence of competition. Since this strategy is costly, requiring prices below variable costs by definition, there needs to be a fair degree of assurance that it will be successful and that prices can then be raised to recover the losses and provide a premium sufficient to have induced the risk-taking involved in violating the antitrust laws. But it is precisely the assurance of an undisturbed recovery period that is wanting in the trucking industry.

Entry is too easy, alternatives for the shippers (private carriage, contract carriage, common carriage, substitute products and substitute sources), are too plentiful. To allow fear of predation to thwart beneficial policy changes would be totally counterproductive. Furthermore, it is all too often that vigorous competition is mistaken for predation. We believe that the proper public policy approach is to allow regulatory reform to go forward, and adjust for potential, but improbable, risks only if they do in fact materialize.

e. *Household goods issues.*—The household goods carrier interests opposed to the exemption argue that it is contrary to the Household Goods Transportation Act of 1980, which recognizes the unique nature and vulnerable status of the so-called individual "consumer shipper" who moves only rarely. We find nothing in the Household Goods Transportation Act to indicate that contract household goods carriers may not be exempted. To the contrary, section 4 of that act indicates that household goods carriers are subject to the provisions of 49 U.S.C. 10762, including its exemption provisions. Further, the salient policies underlying the act (reduced regulation, eased entry, and pricing flexibility) were also intended to govern the household goods industry.[18] See H.R. Rept. 1372, 96th Cong., 2d sess. 3-5 (1980).

Apparently the opposing household goods interests are concerned that the consumer shippers will suffer as a result of the exemption because they will subsidize the carriers' rate wars for attractive contact business.[19] The

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[18] Household goods common carriers are now afforded even more pricing flexibility than other motor common carriers. For example, they can offer various innovative pricing techniques such as service based on binding written estimates rather than actual weights and tariffs. See H.R. Rept. 1372, *supra*, at 7-8.

[19] We presume that the commentors are not suggesting that consumer shippers would be *directly* affected by an exemption, since consumer shippers would generally shop for services by calling several carriers for estimates rather than reviewing public tariffs.

same considerations that apply to dual operators in general, however, apply to household goods dual operators. Given the current competitive climate, contract carriers could not practically succeed in such a pricing policy.

We conclude that contract household goods carriers should not be excluded from the general tariff exemption for contract carriers. The apparently favorable experiences of the household goods carriers (such as Allied) that have been exempted on a case-by-case basis supports the exemption.

SUMMARY

In summary, we are not persuaded by the arguments made by the parties opposing the exemption. The same arguments that the common carrier interests raise here, such as those of competitive inequality, were raised when we proposed exempting TOFC/COFC services from rate regulation and other regulatory requirements. The opponents of the TOFC exemption (largely motor common carrier interests) argued that they would be unable to compete because railroads would file "secret rates"; that railroads would abuse their market power and engage in discrimination and predatory pricing (citing legislative and regulatory attitudes that were prevalent 20 years ago); and that the broad exemption was beyond the Commission's authority. We rejected those arguments in that proceeding, and the experience of the public under the TOFC/COFC exemption has been most favorable. We again reject those arguments in this proceeding and conclude that a broad tariff exemption for all contract carriers of property is warranted and will produce significant public benefits.

Environmental and Energy Considerations

We adopt the preliminary finding in our proposed rules that this action will not significantly affect the quality of the human environment or the conservation of energy

resources. No comments have been submitted on any matter indicating that a contrary position is warranted.

Regulatory Flexibility Analysis

We also adopt the preliminary finding that this proceeding will have a significant economic impact on a substantial number of small entities and that those impacts will be beneficial.

The vast majority of comments did not specifically address the issue of impact on small entities. A few comments suggested that small shippers would be harmed by the proposed exemption for the same reasons that larger shippers would be harmed. These fears should be adequately dispelled by our discussion above.

The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) supports the exemption because it contends that the regulatory burden of filing tariffs falls disproportionately on small carriers. The SBA notes that while all carriers incur some costs in the preparation of tariffs, small carriers, which comprise the vast majority (88 percent) of contract carriers, have fewer revenue-miles over which to spread the cost and thus are competitively disadvantaged relative to larger entities. We agree with the SBA's assessment of the impact of this exemption.

Ultimate Findings

We conclude that the proposal is consistent with the public interest and the national transportation policy. The exemption will promote competitive and efficient service designed to meet the needs of shippers, receivers, and consumers; will permit a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public; will allow the most productive use of equipment; and will maintain a sound, safe, and competitive privately-owned motor carrier system.

COMMISSIONER ANDRE, joined by VICE CHAIRMAN STERRETT, concurring:

The Contract Carrier Conference is to be commended for its part in initiating this proceeding. The Federal Trade Commission had filed a petition for tariff relief in June 1982, but there was some question at the time whether this Commission could consider the FTC petition since it had not been filed by a carrier. The concern was laid to rest in July when the Conference filed on behalf of its contract carrier members. These two petitions focused attention on a costly and nonproductive aspect of regulation. Consequently, the Commission issued a notice of proposed rulemaking in December 1982, committing itself to a final decision within 60 days of the close of public comment. While the announced deadline was not met, the case has not languished either. So perhaps the result in this case is twice beneficial. The contract carrier sector, its carriers and users, will benefit from an increase in competitive efficiency and a decrease in unproductive costs. And the Commission may have discovered a way to speed its discretionary docket: commit itself to public target dates and run the risk of embarrassment.

There should be no doubt that tariff filing imposes costs on the public. There is the expense involved in the paperwork. More than 66,000 contract tariffs were filed last year. Various estimates of the time and money spent on these filings have been made and challenged in this docket. A precise estimate is not possible, but its components would include private sector costs, and those of the Commission as well, since the public pays both as increments either to prices or taxes. If, the total cost per tariff is no more than $500, then tens of millions are expended annually on paperwork alone.

A second type of cost that needs consideration is the loss of business opportunity. Agreements between car-

riers and shippers can be impeded because of the added delay and expense of tariff filing. Where the benefits to both parties are large, tariff concerns will not defeat a deal. But in cases where the gains at first appear small or where time is of the essence, agreements may not be reached. Just how much is lost to the public is unknown, but prudent policy requires the assumption that significant losses are possible. A third category of cost stems from the fact that the filing requirement impinges on the free operation of the price system, perhaps defeating it altogether in some instances. Filing makes contract carriage less competitive and efficient than otherwise. While the process by which diminished competition lessens consumer welfare is well understood, these losses are not easy to identify specifically or to quantify reliably. Nevertheless, competitive efficiency is so central to consumer welfare that it is safe to assume that the anticompetitive impact of the tariff system may be its worst feature.

It is fortunate that there is no need to quantify any of these costs precisely. There are convincing statements in the record that expenditures of cash and management time are considerable, and that business opportunities are frequently missed, and competition diminished. Whatever the arguable range of the costs thus incurred, the sums are clearly not trivial. The question that then arises is this: what are the public benefits that warrant the continued imposition of nontrivial costs on the transportation system? The answer is that there are none. Of the 66,000 contract tariffs filed last year, none were suspended or investigated. So it is irrelevant what one thinks about the efficacy of rate regulation; these tariffs are not being used to support an active program of rate prescription. In fact, the Interstate Commerce Commission has only limited power over contract rates. It cannot set maximum rates for contract carriers, and the statute does not make discrimination between shippers unlawful. The Commission's power is restricted to the

prescription of minimum rates. That is, the Commission's authority is limited to deciding when the rates in a contract might be too low.[20] But even in the field of minimum rates there has been no recent activity that would indicate that the tariff system is used to support active rate regulation. The Contract Carrier Conference characterizes minimum rate complaints as "vanishingly rare" and states that it is unable to determine that last time that the Commission upheld such a complaint. No one seriously challenges this characterization.

There is an argument that, without regard to the power to prescribe rates, the very fact of tariff filing itself opens up the competitive process in a way that enhances performance and deters predatory conduct. Legislation in 1957 required contract carriers to file the actual rates that they charged their customers;[21] prior to that, minimum rates, whether or not used by the carrier, were all that had to be included in tariffs. The 1957 enactment contained several provisions that were designed to curtail the expanding impact of contract carriage,[22] and the provision requiring the filing of actual rates was clearly influenced by the belief that "open" contract pricing would enhance the competitive position of common carriage.[23] The opposition to tariff exemption in this proceeding relies heavily on this 1957 legislation, and understandably so.

The difference between 1983 and 1957 is, however, more than just a quarter century. The most obvious

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[20] See 49 U.S.C. 10702(b) and 10708(a)(1)(B).

[21] Public Law 85-124, 71 Stat. 343 (1957).

[22] The most significant of the 1957 amendments restricted the number of customers that a contract carrier could serve. *See Umthun Trucking Co. Extension—Phosphatic Feed Supplies*, 91 M.C.C. 691 (1962).

[23] See S. Rept. 335, 85th Cong., 1st sess. (1957); H. Rept. 895, 85th Cong., 1st sess. (1957); quoted extensively in the comments of Bulk Carrier Conference, Inc. (January 20, 1983, this docket.)

difference is the Motor Carrier Act of 1980.[24] The 1935 statute that initiated motor carriage regulation sought to create a controlled entry system in which competitors could be protected from themselves. Not surprisingly, outsiders became more aggressive as the profit opportunities inside the cartel grew more considerable. Problems with "predatory" rail rates, the growth of private carriage, "unauthorized" operations, and the spread of contract carriage all reflect the inevitable weakness of cartels. In 1957 the Congress sought to attack one aspect of this problem by tightening the regulatory regime. In 1980 that course was emphatically reversed. It has been said often, but still bears repeating: the Commission now operates under a revised National Transportation Policy that designates competition and efficiency as the principal regulatory tools. Substantial freedom has been returned to all categories of carriers, so that they may choose their prices and services as the dictates of the market demand. Contract carriers have been relieved of the stigma of second class citizenship. They are now permitted to serve any number of customers, they may hold common carrier authority, they may contract with freight forwarders, and they may commingle loads of contract freight and common carrier freight on the same truck.[25]

Nevertheless the opposition parties would still have the Commission adhere rigidly to the tariff filing aspect of the 1957 law because they argue that "open" pricing is required by the competitive goals of the Motor Carrier Act of 1980. But experience demonstrates that "open" pricing, whether by tariff or otherwise, is not necessary to achieve acceptable competitive performance. Agricultural trucking has always been exempt from rate regula-

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[24] Public Law 96-296, 94 Stat. 793 (1957).

[25] See section 10 of the Motor Carrier Act of 1980, *supra*, and H. Rept. 96-1069, 96th Cong., 2d sess. (1980) at 22.

tion and tariff filing, and this has not led to destructive or predatory practices. Recently the Commission exempted much of intermodal transportation from tariff and rate regulation,[26] and the experience so far has been a welcome increase in the vitality of his market without any serious indication of anticompetitive behavior or public harm. The Commission long ago granted a tariff filing exemption to armored car service, again without any harmful public impact.[27]

For the past year tariff exemptions have been given to contract carriers on an individual basis, perhaps more than 250 to date. There is no evidence that these exemptions have lessened competition in the marketplace. While "open" pricing has a superficial attractiveness, even without tariff listings a competitor is not likely to be unable to find out the price he must offer in order to be competitive. Indeed an argument can be made the other way, that price lists facilitate price fixing, and that the Commission is well advised to grant this exemption, which is, of course, reversible, on the theory that concealed rate reductions can be counted on to break down any remaining stickiness in the outmoded pricing patterns of an industry emerging from regulation. Given that experience with the variety of exemptions above shows no need for open pricing, it is clearly within the Commission's discretion, and not arbitrary or unfounded, for the Commission to continue to issue individual contract exemptions. However, that process would necessarily involve a high cost in terms of legal and administrative fees. A blanket exemption will reduce these costs substantially, with the advantage that the remaining contract carriers will receive relief simultaneously.

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[26] Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation* (not printed), served February 19, 1981, affirmed *sub nom. American Trucking Association* v. *I.C.C.*, 656 F.2d 1115 (5th Cir. 1981).

[27] *Armored Carrier Corp. Petition for Relief, Section 218(a)*, 303 I.C.C. 781 (1958).

The Regular Common Carrier Conference of the American Trucking Associations and other representatives of the common carrier sector make two additional arguments that warrant comment: first, they claim that contract carriers will use secret, unregulated rates to predatory advantage; and, second, they argue that common carriers cannot be expected to remain competitive with others that do not suffer the common carrier's regulatory burden. On examination, the predation argument can be seen to be meritless, except as it relates in an unintended way to the claim that common carriage will be handicapped by regulatory requirements. Predation is not inferred from aggressive competition, even that which results in wide swings in market share between competitors.[28] Predation is characterized by an intent to achieve monopoly gain through tactics that are not related to the productive efficiency of the firm. The example most often cited, although far less often realized, is the use of below-cost pricing to drive out rivals and capture markets that are thereafter subjected to higher, monopoly prices. The problem should be a false concern in the trucking industry. "Captive" markets are not defensible over any significant period because entry into trucking is relatively inexpensive and rapid, particularly since the industry's principal capital stock can be readily leased and is itself mobile. Consequently, unless nonmarket barriers are postulated, the risks of undertaking a predatory campaign loom so large that they should discourage all but the irrational. There is the immediate cash drain of pricing below the out-of-pocket cost of pro-

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[28] The Motor Carrier Act of 1980 includes a statement in its new entry standards to the effect that diversion of revenues from an existing firm is not a probable indicator of competitive harm. (Section 5 of the Motor Carrier Act of 1980, amending 49 U.S.C. 10922(b).) An underlying purpose of the reform law is to insure that shippers have an opportunity to do business with efficient transportation firms. That necessarily implies an expectation of "diversion" and a tolerance for it.

viding service, there is the danger that the demand for lower prices will spread beyond the markets targeted for capture, and there is the need to be concerned with treble damage actions should the strategy be detected and proven in the courts. So it should not be surprising that a predatory binge is not credible. Preoccupation with this unlikely problem does not justify the retention of a costly industrywide tariff scheme as prophylaxis.

There is, however, some possible merit to the argument that uneven regulatory requirements will distort the competitive relationship between contract and common carriers. While there may be no purely market originated barriers that could reward a predatory strategy, cost differences imposed by government regulation might suffice. In the academic criticism of transportation regulation that preceded reform legislation there is unanimous agreement that government-conferred privilege has been capable of sustaining monopoly advantage where the marketplace would have otherwise eroded it.[29] Whether the elimination of tariff filing for a part of the industry confers a sufficient advantage in cost and efficiency to result in significant distortion depends on the magnitude of the savings thus permitted. Since savings above the trivial range have been assumed here, the Commission cannot completely disregard this problem. However, the proper response is not maintenance of the *status quo*. It is to proceed rapidly to equalize the advantages that may have been conferred.

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[29] See *e.g.*, T. G. Moore, *Freight Transportation Regulation*, (1972); A. F. Friedlander, "The Social Costs of Regulating the Railroads," printed in the *American Economic Review* (May 1971); and, generally A. E. Kahn, *The Economics of Regulations*, volumes 1 and 2 (1970). It is important to note that the advantage thus gained does not necessarily pass to the equity holders of the regulated firms, indeed it is somewhat unusual when it does. Labor and suppliers, even competing modes are just as likely to be the beneficiaries of the market power created by government restriction.

The Commission should, for example, immediately institute a proceeding to consider granting blanket authority for short notice rate changes by common carriers[30] and we should allow the filing of rates for individually named shippers.[31] These actions would permit common carriers to respond rapidly and specifically to competitive pressures. By acting now on these and other measures[32] we can avoid the alternative of gradual, haphazard reform that is likely to cause interim misallocation of energy, talent and resources. I am confident that the Commission will reach these additional matters promptly, and that the result will be to give all carriers as much opportunity as exists in the Interstate Commerce Act to take advantage of the reforms of 1980. The Commission can thus insure that it does not, in the course of regulatory reform, create new and unnecessary distortions along the way.

It is ordered:

1. RCCC's petition for reconsideration is denied.

2. The request for cross-service is denied.

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[30] A majority of the Commission voted in Ex Parte 297 (Sub-No. 5) to institute such a proceeding.

[31] The Commission issued a notice of proposed rule to consider rates for named shippers in June 1982, and the record has been closed for some time.

[32] The record is ripe for decision in Ex Parte 230 (Sub-No. 6), *Improvement of TOFC/COFC Regulation (Railroad Affiliate Motor Carriers and Other Motor Carriers)*. A favorable decision in this case would permit independent motor carriers to participate more fully in the TOFT/COFC exemption. The Commission would also be well advised to consider a class exemption for finance transactions under 49 U.S.C. 11343(e). The Commission has ample authority to further streamline motor carrier consolidations. A class exemption would facilitate any restructuring in the industry that the recent recession and the reforms of surface transportation regulation may indicate.

3. The request for oral hearing for cross-examination is denied.

4. The American Bus Association's request that this proceeding be discontinued insofar as it relates to contract carriers of passengers is granted, and that portion of this proceeding is discontinued.

5. The application for exemption of all motor contract carriers of property from tariff filing requirements, present and future, pursuant to 49 U.S.C. 10702(b), 10761 (b), and 10762(f), is granted.

6. Title 49 of the Code of Federal Regulations is modified as set forth in the appendix.

7. This decision will be effective July 1, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison, Commissioner Andre, joined by Vice Chairman Sterrett, concurred with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

[SEAL]

APPENDIX

Title 49 of the Code of Federal Regulations is amended as follows:

Part 1162—Temporary Authority Procedures Under 49 U.S.C. 10928

1. In section 1162.3 paragraph (b) is revised to read as follows:

§ 1162.3 *Processing of applications.*

* * * * *

(b) *Publication of rates and charges.* A contract carrier of passengers or a common carrier may not lawfully perform transportation under a grant of temporary authority unless and until compliance has been made with the rate and other requirements of 49 U.S.C. 10761 and 10762.

* * * * *

2. In section 1162.5, the first sentences of section 1162.5(a)(3) and (b)(1) are amended and as revised, the paragraphs read as follows:

§ 116.5 *Rates, fares, charges, and special permission applications.*

* * * * *

(a) * * *

(3) *Motor contract carriers.* A motor contract carrier of passengers may not lawfully provide transportation until effective rates, fares, and/or charges, together with supporting schedule provisions are on file with the Commission as required by 49 U.S.C. 10761 and 10762 and the Commission's rules and regulations.

* * * * *

(b) *Emergency temporary authority.* (1) Motor carriers. Each application for emergency temporary authority for 30 days or less (except those involving the Rail-

way Express Agency, substitution of motor for rail service, or contract carriers of property) shall be accompanied by a statement of the rates, fares, charges, and other tariff or schedule provisions to be filed under Special Permission M-60160 or M-60161, sections 1306.100, 1360.101, 1307.100, and 1307.101 of this chapter, for use in the event the authority is granted.

* * * *

Part 1307—Freight Rate Tariffs, Schedules, and Classifications of Motor Carriers

3. The heading and text of section 1307.0 are revised to read as follows:

Section 1307.0 *General.* Motor contract carriers of property shall not be required to publish or file schedules stating the rates or charges covering the services provided or the rules, practices, or regulations affecting those rates and charges.

4. Sections 1307.1 through 1307.18, inclusive, are removed and reserved for future use.

5. Sections 1307.21 through 1307.50, inclusive, are removed and reserved for future use.

6. Section 1307.101 is removed and reserved for future use.

APPENDIX D

INTERSTATE COMMERCE COMMISSION DECISION

No. 38749 (Sub-No. 1)[1]

UTF CARRIERS, INC.—PETITION FOR EXEMPTION FROM TARIFF FILING REQUIREMENTS

Decided: June 16, 1983

The motor contract carriers that are subjects of the proceedings identified in the appendix to this decision filed individual petitions requesting exemptions from the tariff filing requirements of 49 U.S.C. 10702, 10761, and 10762. As the issues presented, the relief sought, and the comments in opposition are substantially the same, we are consolidating these proceedings. The purpose of this decision is to finalize the provisional tariff relief awarded in these cases.

Prior to consideration of the comments, one preliminary matter requires our consideration. The commentors filed numerous motions including: (1) motions for discovery and leave to file supplemental comments; (2) motions to rescind the provisional exemptions; and (3) motions to stay the individual exemption proceedings pending the outcome of Ex Parte No. MC-165, *Exemption of Motor Carriers From Tariff Filing Requirements.* Because a final decision was recently issued in Ex Parte

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[1] This proceeding embraces numerous other exemption proceedings, as set forth in the appendix to this decision.

No. MC-165, *Exemption of Motor Contract Carriers From Tariff Filing Requirements* (not printed), served May 27, 1983, and because further discovery will not likely disclose information that would affect the result reached in this decision, all of the pending motions will be denied.

The arguments raised by the common carrier interests opposing the exemptions are for the most part similar.[2] Generally, these parties argue that a grant of the various applications for tariff relief will give contract carriers an unfair competitive edge over the still-regulated common carriers by authorizing individual contract carriers to charge "secret rates" that can be changed without notice. They assert that individual exemptions would contravene the national transportation policy (NTP) and the public interest, which, in their view, require open pricing and the protection of the common carrier industry from competition from contract carriers. And they contend that industrywide relief is inappropriate both because it is contrary to certain 1957 legislation requiring publication of actual (not just minimum) contract carrier rates, and because it was not explicitly provided for in the Motor Carrier Act of 1980.

These arguments have been addressed in *Ex Parte No. MC-165*. They do not address the specifics of individual circumstances that pertain to particular applicants. Consequently, it is sufficient to reaffirm our general conclusions made in *MC-165*, and we do so.

After reviewing the comments in these proceedings, we conclude, consistent with the findings in Ex Parte No. 165, that each of the individual petitioners should be granted an exemption from the tariff filing requirements

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[2] Virtually all of the arguments in opposition to the requests for individual relief were raised and addressed in our Ex Parte No. MC-165 rulemaking proceeding, in which we adopted an industrywide tariff exemption, effective July 1, 1983.

of 49 U.S.C. 10702, 10761, and 10762. The exemptions will lower carrier and shipper costs; enhance the quality of the transportation services provided; and allow a variety of price options to meet the changing market demands and diverse requirements of the shipping public.

The common carrier interests have not presented concrete examples of precisely how an award of the specific exemptions contemplated here would undermine their ability to compete or otherwise be contrary to the public interest. There is no persuasive evidence that any of these individual applications is so out of the ordinary as to present an imminent danger to the competitive process. We will not maintain unnecessary regulatory constraints where they are not needed and where they may in fact be counterproductive. We, therefore, find that the exemptions sought by petitioners are in the public interest, and they will be granted.

We have exhaustively considered the issues in these cases. Because of our strong conviction that these exemptions are in the public interest, we are waiving the requirement for initial decisions under 49 U.S.C. 10322 (b). This decision will be the Commission's final decision. 49 U.S.C. 10322(c).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The pending motions (a) for discovery and leave to file supplemental comments, (b) to rescind the provisional exemptions; and (c) to stay the individual exemption proceedings pending the outcome of Ex Parte No. MC-165 are denied.

2. Pursuant to 49 U.S.C. 10702(b), 10761(b) and 10762(f), each petitioner is granted a final exemption from the contract carrier tariff filing requirements.

3. This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison. Commissioner Gradison concurred. Chairman Taylor dissented in part with a separate expression.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

Chairman Taylor, dissenting in part:

While I agree with the result reached in this proceeding as to our tariff filing requirements for existing contracts, I continue to believe that relief from these requirements should not be extended prospectively, on a case by case basis, to contracts not yet in existence.

The proper vehicle for seeking a general exemption from our tariff filing requirements for *all* contracts, both existing and prospective, is Ex Parte No. MC-165, *Exemption of Motor Contract Carriers From Tariff Filing Requirements*, provided, of course, this rulemaking becomes effective.

APPENDIX E

Service Date July 5, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. 38895 et al.[1]

INTERNATIONAL TRANSPORT, INC.—PETITION FOR EXEMPTION FROM TARIFF FILING REQUIREMENTS

Decided: June 16, 1983

The purpose of this decision is to address the numerous pleadings filed by parties opposing the decisions issued in the individual tariff filing exemption proceedings set forth in the appendix. These pleadings, filed by the Regular Common Carrier Conference (RCCC) and the Eastern Central Motor Carriers Association, Inc. (ECMCA), were variously styled "petition for administrative review" and "petition for stay pending administrative review". In addition, replies to these pleadings were filed. The relief sought in all of these pleadings is essentially the same and will be denied in each case as inappropriate.

The issues raised in the petition here are essentially the same as those raised by RCCC and ECMCA in their comments in opposition to tariff relief sought in No. 38749 (Sub-No. 1), et al., *UTF Carriers, Inc.—Petition for Exemption from Tariff Filing Requirements.* In that case we have today awarded tariff relief in all of the outstanding provisional exemption proceedings. Inasmuch as we have already addressed the issues raised by the

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[1] This proceeding embraces numerous tariff filing exemption cases set forth in the appendix.

parties in that proceeding, we see no need for further discussion here. Therefore, the petitions will be denied.

We find:

The issues raised by the petitioners do not warrant a result different from that reached in the earlier decisions in the individual proceedings set forth in the appendix. This decision does not signficantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The petitions filed by the Regular Common Carrier Conference and the Eastern Central Motor Carriers Association, Inc., are denied.

These proceedings are administratively final.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison. Commissioner Gradison concurred. Chairman Taylor dissented in part with a separate expression.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

Chairman Taylor, dissenting in part:

While I agree with the result reached in this proceeding as to our tariff filing requirements for existing contracts, I continue to believe that relief from these requirements should not be extended prospectively, on a case by case basis, to contracts not yet in existence.

The proper vehicle for seeking a general exemption from our tariff filing requirements for *all* contracts, both existing and prospective, is Ex Parte No. MC-165, *Exemption of Motor Contract Carriers From Tariff Filing Requirements*, provided, of course, his rulemaking becomes effective.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-165 [1]

EXEMPTION OF MOTOR CONTRACT CARRIERS FROM TARIFF FILING REQUIREMENTS

AGENCY: Interstate Commerce Commission.

ACTION: Notice of court action.

SUMMARY: By order filed July 20, 1983, the United States Court of Appeals for the District of Columbia Circuit stayed the Commission's decisions in: Ex Parte No. MC-165 (48 Fed. Reg. 24388, June 1, 1983); No. 38749 (Sub-No. 1) et al. (served July 5, 1983); and No. 38895 et al. (served July 5, 1983), pending judicial review. By order filed July 29, 1983, the court denied motions for reconsideration, rehearing, and vacation of the stays and it also further clarified its July 20th order.

FOR FURTHER INFORMATION CONTACT:
Jane Morris
(202) 275-6434

or

Howell I. Sporn
(202) 275-7691

SUPPLEMENTARY INFORMATION:

The purpose of this notice is to inform the public of recent court decisions that affect these proceedings and

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[1] This notice also includes No. 38749 (Sub-No. 1) et al., *UTF Carriers, Inc.—Petition for Exemption From Tariff Filing Requirements,* an1 No. 38895 et al., *International Transport Inc.—Petition for Exemption From Tariff filing requirements.*

to explain how we plan to handle contract carrier tariff exemption proceedings in the future.

In Ex Parte No. MC-165, *Exemption of Motor Contract Carriers From Tariff Filing Requirements*, served May 27, 1983, we exempted all motor contract carriers of property from the otherwise applicable tariff filing requirements. In No. 38749 (Sub-No. 1) et al., *UTF Carriers, Inc.—Petition for Exemption From Tariff Filing Requirements*, and No. 38895 et al., *International Transport, Inc.—Petition for Exemption From Tariff Filing Requirements*, we granted final exemptions or affirmed final grants of exemption to certain individual motor contract carriers.

The United States Court of Appeals for the D.C. Circuit stayed all three of these decisions pending judicial review in its order filed July 20, 1983.

Subsequently, by order filed July 29, 1983, the court denied motions for reconsideration, rehearing, and vacation of the stays and also offered the following clarification of its July 20th order:

> The movants erroneously characterize the stay of the Commission's July 5, 1983 orders as staying individual exemption proceedings. Individual exemption proceedings have not been stayed; we do no more than return each to the status quo existing prior to the July 5 orders. Rather, what has been stayed is the Commission's summary disposition of all pending individual exemption proceedings simply by reference to the findings and general conclusions made in issuing the prior industry-wide tariff exemption in *Ex Parte MC-165*. Our stay in No. 83-1581 of *Ex Parte MC-165* precludes such an automatic grant of individual exemption applications. Each such application must, pursuant to past practice, be examined on its own merits.

As a result of the court action, the decision granting industry-wide relief in Ex Parte No. MC-165 and the final decisions in the individual proceedings consolidated in No. 38749 (Sub-No. 1) et al. and No. 38895 et al., are no longer in effect. Provisional or permanent exemptions previously granted in those proceedings, however, remain in effect since the court directed that each of the proceedings be returned to the status quo existing prior to our July 5th decisions. Therefore, those operating without tariffs under an existing provisional or permanant exemption may continue to do so.

Consistent with the court's July 29th order, we will continue to process petitions for exemption from tariff filing requirements. Each petition will be handled on an individual basis. When a carrier files a petition that makes a *prima facie* case for tariff relief, we will publish a notice of proposed exemption in the Federal Register and will issue a decision advising that the proposed grant will become effective at the close of the 15 day comment period unless timely filed adverse comments are received.[2] If timely adverse comments are received, we will issue a final decision granting or denying the relief sought within 20 days of the close of the comment period.

Factors which we will consider in individual tariff relief proceedings include (but are not limited to) the following:

1. Specific ways in which an exemption will increase the particular carrier's pricing flexibility and marketing ability.

2. Specific dollar amounts by which a particular contract carrier's costs will be lowered as a result of an exemption.

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[2] Individual exemption applications may be consolidated for Federal Register publication, but each should be addressed individually in the comments and will be decided separately.

3. Any particular facts unique to the contracting shippers involved which make an exemption consistent with the public interest and the national transportation policy.

4. Any unnecessary burdens that will be alleviated by a tariff exemption.

Decided: August 29, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-1581

CENTRAL AND SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, INC., *et al.*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
And Consolidated Cases

[Filed May 17, 1985]

ORDER

Before: Wright and Scalia, Circuit Judges, and Wilkey, Senior Circuit Judge

Upon consideration of petitioners' petition for rehearing it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER
Clerk

By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Senior Circuit Judge Wilkey did not participate in this order.

APPENDIX H

STATUTES

Interstate Commerce Act, 49 U.S.C.

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—

(1) in regulating those modes—

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transpor-

tation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

§ 10102. Definitions

In this subtitle—

* * * *

(13) "motor common carrier" means a person holding itself out to the general public to provide

motor vehicle transportation for compensation over regular or irregular routes, or both.

(14) "motor contract carrier" means—

* * * *

(B) a person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons—

(i) by assigning motor vehicles for a continuing period of time for the exclusive use of each such person; or

(ii) designed to meet the distinct needs of each such person.

§ 10702. Authority for carriers to establish rates, classifications, rules, and practices

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall establish—

(1) rates, including divisions of joint rates, and classifications for transportation and service it may provide under this subtitle; and

(2) rules and practices on matters related to that transportation or service, including rules and practices on—

(A) issuing tickets, receipts, bills of lading, and manifests;

(B) carrying of baggage;

(C) the manner and method of presenting, marking, packing, and delivering property for transportation; and

(D) facilities for transportation.

(b) A contract carrier providing transportation subject to the jurisdiction of the Commission under chapter 105 of this title shall establish, and file with the Commission, actual and minimum rates for the transportation it may provide under this subtitle and rules and practices related to those rates. However, this subsection does not require a motor contract carrier to maintain the same rates and rules related to those rates for the same transportation provided to shippers served by it. The Commission may grant relief from this subsection when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers or on its own initiative for a water contract carrier or group of water contract carriers.

§ 10704. Authority and criteria; rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

(a) (1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

(2) The Commission shall maintain and revise as necessary standards and procedures for establishing reve-

nue levels for rail carriers providing transportation subject to its jurisdiction under that subchapter that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the Commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate. Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of Staggers Rail Act of 1980 and thereafter as necessary.

(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues.

(b) (1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2) (A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

(B) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier or motor carrier, the Commission shall consider, among other factors, the need for revenues that are sufficient, under honest, economical, and efficient management, to let the carrier provide that transportation or service.

(3) If the carrier is a motor or water common carrier or a freight forwarder, the Commission shall also consider the need, in the public interest, of adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of freight forwarding, respectively.

(c) (1) When the Commission finds that a minimum rate of a contract carrier for transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title, or a rule or practice related to the rate or the value of the service under it, violates this chapter or the transportation policy of section 10101 of this title, the Commission may prescribe the minimum rate, rule, or practice for the carrier that is desirable in the public interest and will promote that policy. In prescribing the rate, the Commission may not give a motor or water contract carrier an advantage or preference in competition with a motor or water common carrier, respectively, if an advantage or preference is unreasonable or inconsistent with the public interest and the transportation policy of section 10101 of this title.

(2) When prescribing a minimum rate, or rule or practice related to a rate, for a contract carrier, the Commission shall consider—

(A) the cost of the transportation provided by the carrier; and

(B) the effect of a prescribed minimum rate, or rule or practice, on the movement of traffic by that carrier.

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a car-

rier may not be maintained at a particular level to protect the traffic of another mode of transportation.

(e) In a proceeding involving a proposed increase or decrease in rail carrier rates, the Commission shall specifically consider allegations that the increase or decrease would (1) change the rate relationships between commodities, ports, places, regions, areas, or other particular descriptions of traffic (without regard to previous Commission consideration or approval of those relationships), and (2) have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease. The Commission shall investigate to determine whether the change or effect violates this subtitle when it finds that those allegations are substantially supported on the record. The investigation may be made either before or after the proposed increase or decrease becomes effective and either in that proceeding or in another proceeding.

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

§ 10708. Investigation and suspension of new nonrail carrier rates, classifications, rules, and practices

(a) (1) The Interstate Commerce Commission may begin a proceeding to determine the lawfulness of a proposed rate, classification, rule, or practice immediately, on its own initiative or on application of an interested party when—

(A) a new individual or joint rate or individual or joint classification, rule, or practice affecting a rate is filed with the Commission by a common carrier, other than a rail carrier, under this subtitle; or

(B) a new or reduced rate or rule or practice that causes a reduction of a rate is filed with the Commission by a contract carrier under this subtitle.

(2) The Commission must give reasonable notice before beginning a proceeding under this section but may act without allowing an interested carrier to file an answer or other formal pleading in response to its decision to begin the proceeding. The Commission may take whatever final action on a rate, classification, rule, or practice under this section, after a full hearing (whether completed before or after the rate, classification, rule, or practices goes into effect) as it could in a proceeding begun after a rate, classification, rule, or practice became effective.

(b) Pending final Commission action in a proceeding under subsection (a) of this section, the Commission may suspend the proposed rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect by (1) delivering to each affected carrier, and (2) filing with the proposed rate, classification, rule, or practice, a statement of reasons for the suspension. If the Commission does not take final action during the suspension period, the proposed rate, classification, rule, or practice is effective at the end of that period. However, if an increase in a rate for, or related to, transportation of property by an express, sleeping car, or pipeline carrier becomes effective under this subsection, the Commission may require the interested carrier to account for all amounts received under it and specify by whom and on whose behalf those amounts were paid. When the Commission takes final action, it may require the carrier to refund, with interest, to the person on whose behalf those amounts were paid, the

part of the increased rate found to be in violation of this subtitle.

(c) In a proceeding under this section, the burden is on the carrier proposing the changed rate, classification, rule, or practice to prove that the change is reasonable. The Commission shall give proceedings under this section preference over all other proceedings related to that type of carrier pending before it and make its decision at the earliest practical time.

(d) (1) Notwithstanding any other provision of this title, the Commission may not investigate, suspend, revise, or revoke any rate proposed by a motor common carrier of property or freight forwarder on the gounds that such rate is unreasonable on the basis that it is too high or too low if—

(A) the carrier notifies the Commission that it wishes to have the rate considered pursuant to this subsection; and

(B) the aggregate of increases and decreases in any such rate is not more than 10 percent above the rate in effect one year prior to the effective date of the proposed rate, nor more than 10 percent below the lesser of the rate in effect on July 1, 1980 (or, in the case of any rate which a carrier first establishes after July 1, 1980, for a service not provided by such carrier on such date, such rate on the date such rate first becomes effective), or the rate in effect one year prior to the effective date of the proposed rate.

(2) The Commission, by rule, may increase the percentages specified in paragraph (1) (B) of this subsection for any group of motor common carriers of property or freight forwarders if it finds that—

(A) there is sufficient actual and potential competition to regulate rates; and

(B) there are benefits to (i) carriers or freight forwarders, (ii) shippers, and (iii) the public from further rate flexibility;

except that the Commission may not increase such percentages by more than 5 percentage points during any one-year period.

(3) (A) In determining, pursuant to paragraph (1) (B) of this subsection, whether the aggregate of increases and decreases in a proposed rate that is to take effect on or before the 730th day following the date of enactment of this paragraph is more than 10 percent (or such other percentage as the Commission may establish under paragraph (2) of this subsection) above the rate in effect one year prior to the effective date of the proposed rate, general rate increases obtained in the one-year period prior to the effective date of the proposed rate shall not be included in such aggregate, except to the extent that such general rate increases exceed 5 percent of the rate in effect one year prior to the effective date of the proposed rate.

(B) In the case of a proposed rate that is to take effect after the 730th day following the date of enactment of this paragraph, the percentage which first appears in paragraph (1) (B) of this subsection (relating to the upper limit of the zone of ratemaking freedom), or such other percentage as the Commission may establish under paragraph (2) of this subsection in lieu of such percentage, shall be increased or decreased, as the case may be, by the percentage change in the Producers Price Index, as published by the Department of Labor, that has occurred during the one-year period prior to the effective date of the proposed rate.

(4) Notwithstanding any other provision of this title, the Commission may not investigate, suspend, revise, or revoke any single-line rate proposed by a motor common carrier of passengers, or joint rate proposed by one or

more such carriers, applicable to any transportation (other than special or charter transportation) on the grounds that such rate is unreasonable on the basis that it is too high or too low if—

(A) the carrier or carriers notify the Commission that they wish to have the rate considered pursuant to this subsection; and

(B) the aggregate of increases and decreases in any such rate is not more than 10 percent above the rate in effect one year prior to the effective date of the proposed rate, nor more than 20 percent below the lesser of the rate in effect on the effective date of this paragraph (or, in case of any rate which the carrier or carriers first establish after such date for a service not provided by the carrier or carriers on such date, such rate on the date such rate first becomes effective), or the rate in effect one year prior to the effective date of the proposed rate.

(5) One year after the effective date of this paragraph, the first and second percentages specified in paragraph (4)(B) of this subsection shall change to 15 percent and 25 percent, respectively. Two years after the effective date, the first and second percentages specified in paragraph (4)(B) of this subsection shall change to 20 percent and 30 percent, respectively.

(6) Any rate implemented by a carrier pursuant to this subsection shall be subject to the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), except that the docketing and publication of such rate by the carrier under section 10706(b) of this title shall not be construed as a violation of the antitrust laws. Evidence that any motor common carrier of passengers established pursuant to this subsection a joint or single-line rate applicable to transportation over any route which is the same as or similar to a joint rate applicable to transportation over such route which such carrier to-

gether with one or more other motor common carriers of passengers established pursuant to this subsection shall not be in and of itself sufficient to establish a violation of any such antitrust law. Nothing in this subsection shall limit the Commission's authority to suspend and investigate proposed rates on the basis that such rates may violate the provisions of section 10741 of this title or constitute predatory practices in contravention of the transportation policy set forth in section 10101(a) of this title.

(e) Notwithstanding any other provision of this title, 3 years after the effective date of this subsection, the Commission may not investigate, suspend, revise, or revoke any rate proposed by a motor common carrier of passengers on the grounds that such rate is unreasonable on the basis that it is too high or too low, unless the proposed rate is established collectively in accordance with the procedures of an agreement approved by the Commission under section 10706(b) of this title. In publishing and filing a tariff under section 10762 of this title, the carrier shall disclose whether such rate is the result of collective ratemaking procedures pursuant to an agreement approved by the Commission under section 10706 (b) of this title.

(f) Notwithstanding any other provision of this title, an interested party may file a complaint under section 11701 of this title challenging the reasonableness of a rate filed under this section by a motor carrier of passengers. Any such complaint proceeding shall be finally determined by the Commission no later than 90 days after the filing of the complaint.

(g) Notwithstanding any other provision of this title, the Commission may not investigate, suspend, revise, or revoke any rate proposed by a motor common carrier of passengers applicable to special or charter transportation. Nothing in this subsection shall limit the Commission's authority to suspend and investigate proposed rates on

the basis that such rates constitute predatory practices in contravention of the transportation policy set forth in section 10101(a) of this title.

§ 10741. Prohibitions against discrimination by common carriers

* * * *

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

§ 10762. General tariff requirements

(a) (1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the povisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chap-

ter, respectively, may not become effective for 30 days after it is filed.

(b) (1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chatpter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c) (1) When a common carrier providing transportation or service subject to the jurisdiction of the Commis-

sion (A) under subchapter I of chapter 105 of this title purposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate of the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change re-

sulting in a reduced rate applicable to special or charter transportaiton shall not become effective for 10 days after the notice is published.

(d) (1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public inerest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail ratemaking associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomse effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceed-

ing under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.

§ 10925. Effective periods of certificates, permits, and licenses

* * * *

(e)(1) On application of a motor contract carrier who holds a permit issued under section 10923 of this title, or on complaint of a competing motor common carrier who holds a certificate under section 10922 of this title, or on its own initiative, if the Commission, after notice and an opportunity for a proceeding, determines that the operations under the permit or any part thereof—

(A) do not conform with the operations of a motor contract carrier; and

(B) are those of a motor common carrier;

the Commission may amend or revoke such permit or part thereof to conform the operations under such permit or part thereof to the operations of a motor contract carrier.

(2) The Commission may issue in place of any permit or part thereof revoked under this subsection a certificate under section 10922 of this title which authorizes the holder of such certificate to provide as a motor common carrier the same type of transportation between the same points or within the same territory as authorized in the permit or part thereof.

Pertinent Pre-1978 Sections of the Interstate Commerce Act

SCHEDULES OF CONTRACT CARRIERS BY MOTOR VEHICLE

SEC. 218. [*August 9, 1935, amended June 29, 1938, September 18, 1940, August 13, 1957.*] [*49 U. S. C. § 318.*] (a) It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the actual rates or charges of such carrier for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder: *Provided*, That any contract carrier serving but one shipper having rendered continuous service to such shipper for not less than one year may file reasonable minimum rates and charges unless the Commission in any individual case, after hearing, finds it in the public interest to require the filing of actual rates and charges. No such contract carrier, unless otherwise provided by this part, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the actual rates or charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this part. Nothing herein provided shall be so construed as to require such carriers to maintain the same rates, rules and regulations for the same services for all shippers served. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affect-

ing such charge or the value of the service thereunder, nor shall any new charge be established, except after thirty days' notice of the proposed change or new charge filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect compensation for such transportation different from the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or less than the minimum rate or charge as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive compensation different from the actual rates and charges so filed, or less than the minimum charges so prescribed: *Provided*, That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in this Act.

(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of

this part, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the service rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath.

(c) Whenever there shall be filed with the Commission by any such contract carrier any schedule stating a charge for a new service or a reduced charge directly, or by means of any rule, regulation, or practice, for the transportation of passengers or property in interstate or foreign commerce, the Commission is hereby authorized and empowered upon complaint of interested parties or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise

go into effect; and after hearing, whether completed before or after the charge, or rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change in any charge or rule, regulation, or practice shall go into effect at the end of such period: *Provided*, That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. The rule as to burden of proof specified in section 216(g) shall apply to this paragraph.

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001*]. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Supreme Court, U.S.
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CLERK

No. 85-252

In the Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission's decision to exempt motor contract carriers of property from the obligation to file tariffs containing the rates set in the carriers' contracts with individual shippers is a proper exercise of the Commission's statutory exemption authority.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 757 F.2d 301. The decision of the Interstate Commerce Commission affirmed by the court of appeals (Pet. App. 59a-88a) is reported at 133 M.C.C. 150. The decisions of the Interstate Commerce Commission that the court of appeals found moot (Pet. App. 89a-92a, 93a-94a, 95a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1985. A petition for rehearing was denied on May 17, 1985 (Pet. App.99a). The petition for a writ of certiorari was filed on August 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the regulation by the Interstate Commerce Commission (ICC) of motor contract carriers of property. Motor contract carriers "provide[] motor vehicle transportation of property for compensation under continuing agreements with one or more persons" (49 U.S.C. 10102(14)(B)). A motor common carrier, by contrast, is "a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes" (49 U.S.C. 10102(13)). Thus, contract carriers operate under contracts with individual shippers while the services of common carriers are available to the public at large.

The Interstate Commerce Act requires a motor contract carrier to file with the Commission tariffs setting forth the carrier's actual and minimum rates (49 U.S.C. 10702(b), 10762). The statute prohibits such a carrier from providing transportation unless the rate for the transportation is contained in a tariff filed with the Commission (49 U.S.C. 10761(a)). These provisions require a contract carrier to file a tariff setting forth the rate established by each contract between the carrier and an individual shipper. However, Congress authorized the ICC to exempt contract carriers from these requirements "when relief is consistent with the public interest and the [national] transportation policy [set forth in 49 U.S.C. 10101]." 49 U.S.C. 10761(b); see also 49 U.S.C. 10702(b) and 10762(f).

2. In the early 1980's, a number of individual contract carriers sought and obtained exemptions from the tariff filing requirement (Pet. App. 9a, 89a-92a, 93a-94a, 95a-98a). Several parties, including the Federal Trade Commission, suggested in mid-1982 that the ICC grant such an exemption to all motor contract carriers (*id.* at 7a-8a, 59a-60a). After issuing a notice of proposed rulemaking and reviewing public comments, the Commission voted to exempt all motor contract carriers of prop-

erty from the tariff requirement (*id.* at 59a-88a). The ICC found that "[t]he public interest lies in ready access to competitive, efficient, and reasonably priced motor carrier service when and where needed" (*id.* at 69a), and concluded that "[f]reeing contract carriers from the requirements of the tariff filing system will promote competitive pricing by allowing them to tailor their service and price options to the individual and varying needs of their contract shippers. Further, eliminating the preparation and filing of tariffs will result in substantial cost savings" (*id.* at 69a-70a (footnote omitted)).

The Commission rejected the claim that an exemption would enable contract carriers to gain an unfair advantage over common carriers because contract carriers would be able to conceal their prices. Observing that the argument was "an unappealing request for equality of disadvantage," the Commission concluded that the best approach was to attempt to "relieve any unnecessary regulatory burdens for all transportation sectors" (Pet. App. 72a).[1] It found that common carriers could lose traffic to contract carriers only "in marginal areas" and that "[s]ervice on-demand to the occasional shipper will remain a huge part of the market" (*id.* at 72a n.16). The Commission accordingly held that the benefits from increased competition and the reduction in the regulatory burden outweighed any possible loss of business by common carriers (*id.* at 72a n.16, 73a).

The ICC also found that an exemption from the tariff filing requirement would not enable contract carriers to engage in predatory pricing. This behavior is defined as

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[1] The Commission noted that contract carrier tariffs do not disclose all of the terms and conditions of the contract and that "[c]onsequently, the easy price comparison that is the foundation of the open price argument has never been a real possibility." Pet. App. 71a-72a n.15; see also *id.* at 69a.

"pricing below cost for the purpose of driving rivals out of a market and recouping the losses through higher profits earned later in the absence of competition" (Pet. App. 74a). Finding that the ease of entry into the shipping industry and the existence of "plentiful" alternatives for shippers would make it impossible for a carrier engaging in predation to earn the high profits needed to offset earlier losses (*id.* at 75a), the Commission determined that contract carriers are not likely to engage in predatory pricing. It concluded that "the proper public policy approach is to allow regulatory reform to go forward, and adjust for potential, but improbable, risks only if they do in fact materialize" (*ibid.*).[2]

3. The court of appeals unanimously affirmed the Commission's order (Pet. App 1a-57a).[3] The court first held that the exemption provisions of the Interstate Commerce Act authorize the Commission to exempt all motor contract carriers of property from the tariff filing requirement. Noting that "the exemption provisions assign broad authority to the Commission," the court concluded that in construing the statute "the agency's interpretative domain is at its zenith and the judicial license at its nadir" (*id.* at 24a). The court rejected petitioners' arguments that the statutory exemption authority cannot be exercised on a class-wide basis (*id.* at 28a-39a).

The court of appeals also upheld the ICC's decision to grant the exemption in this case. It found that the Commission had correctly determined that the elimination of the tariff filing requirement would result in cost savings

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[2] Commissioner Andre and Vice Chairman Sterrett filed a concurring opinion agreeing with the Commission's conclusions (Pet. App. 78a-85a).

[3] The court concluded that challenges to the Commission's orders regarding exemptions of individual contract carriers were moot "by virtue of [the court's] decision * * * to affirm the Commission's broad exemption" (Pet. App. 13a).

and enable contract carriers to respond more easily to competition (Pet. App. 49a-52a). With respect to petitioners' claim that the exemption placed them at a competitive disadvantage, the court stated that such a "competitive disadvantage is not necessarily contrary to the purpose of the amended Motor Carrier Act" (*id.* at 41a), but that, in any event, the "fears of competitive disadvantage are greatly exaggerated" (*id.* at 42a). The court noted that the cost savings to contract carriers were not likely to give individual contract carriers a significant competitive advantage (*ibid.*). It also rejected the argument that the exemption from tariff filing would enable contract carriers to benefit from secret prices (*id.* at 43a-44a). Finally, the court agreed with the Commission's conclusion that contract carriers are not likely to engage in discriminatory or predatory pricing (*id.* at 45a, 48a-49a), and noted that "the Interstate Commerce Commission, the Federal Trade Commission, and aggrieved carriers all have the proven ability to expose the unlawful conduct and bring the lawbreaker to justice" (*id.* at 49a).

ARGUMENT

The well-reasoned opinion of the court of appeals, upon which we rely, does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioners object to the Commission's order on the grounds that the exemption poses a competitive threat to common carriers (see, *e.g.*, Pet. 6, 9), and will enable motor contract carriers to escape all ICC regulation and "engage in unfair and destructive pricing" (Pet. 4-5). These arguments rest upon "protectionist and anticompetitive" principles that are antithetical to modern-day motor carrier regulation (Pet. App. 31a) and, accordingly, were properly rejected by the Commission and the court below.

The court of appeals correctly observed that "[m]otor carrier regulation has evolved from a regime designed to protect common carriers against competition from contract carriers to one in which common and contract carriers are to compete with each other and with other modes of transportation as well" (Pet. App. 13a). The Motor Carrier Act of 1980 expressly states that it "is part of the continuing effort by Congress to reduce unnecessary regulation" (Pub. L. No. 96-296, § 2, 94 Stat. 793).[4] Congress announced that national policy with respect to the transportation of property by motor carriers is "to promote competitive and efficient transportation services" that "meet[] the needs of shippers, receivers, passengers, and consumers" (49 U.S.C. 10101(a)(2)). Congress sought in the 1980 statute to "remove[] many of the obstacles that have kept contract carriers from realizing their full potential." H.R. Rep. 96-1069, 96th Cong., 2d Sess. 22 (1980). In addition, it directed the ICC to "recognize the importance of competition and efficiency in motor carrier operations as the most desirable means for achieving national transportation goals and objectives" (*id.* at 12).

The Commission's decision in this case plainly comports with these congressional directives. The Commission found that the obligation to file tariffs containing contract rates imposes unnecessary regulatory costs, deters in-

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[4] Congress found (§ 3(a), 94 Stat. 793):

> the statutes governing Federal regulation of the motor carrier industry are outdated and must be revised to reflect the transportation needs and realities of the 1980's; that historically the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the trucking industry; [and] that protective regulation has resulted in some operating inefficiencies and some anti-competitive pricing.

novation, and encourages price matching in the place of competition.[5] It granted the exemption in order to eliminate these undesirable effects and promote competition. The court of appeals upheld the Commission's conclusions. Pet. App. 44a, 51a-52a, 69a-70a, 71a.[6]

Petitioners argue (Pet. 6, 9, 11-12) that the Commission's decision will subject common carriers to a competitive disadvantage because only common carriers' rates will be revealed in tariff filings.[7] However, as both the Commission and the court of appeals observed, the tariffs filed by contract carriers have not recited every contract term and therefore have provided little assistance to common carriers competing with contract carriers (Pet. App. 44a & n.141, 71a-72a n.15). Moreover, common carriers can compete by providing contract carriage services (*id.* at 45a-46a).

At all events, as both the court and the Commission agreed, the Commission's obligation is to implement Congress's mandate for a regulatory system based to the greatest extent possible upon competition, not to provide

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[5] Since contract carriers' rates are set through negotiation, the rates are subject to invalidation by the Commission only if they are too low. *Contracts of Contract Carriers*, 1 M.C.C. 628, 629 (1937). As we discuss below (see pages 8-9), filing of tariffs is not needed to enable the Commission to enforce this requirement.

[6] Petitioners intimate (Pet. 12) that the Commission's decision is improper because Congress did not specifically indicate in the 1980 statute that tariff filings could be eliminated in order to promote competition if that decision is consistent with the public interest. However, as the court of appeals stated, "[t]here is nothing to indicate that Congress exhausted the deregulatory agenda it set in the 1980 Motor Carrier Act" (Pet. App. 30a).

[7] The court of appeals demonstrated (Pet. App. 42a-43a) that the cost saving to an individual contract carrier as a result of the exemption is unlikely to impose a competitive disadvantage on an individual common carrier.

the "equality of disadvantage" sought by petitioners (Pet. App. 46a-47a, 72a-73a). The Commission concluded that any loss of traffic by common carriers would occur in "marginal" areas and that "[s]ervice on-demand to the occasional shipper will remain a huge part of the market" (*id.* at 72a n.16). Since the Commission's task is to assess the public interest generally, not to safeguard common carriers' market shares, it correctly concluded that "it would be contrary to the public interest to forego the gains that will come of tariff elimination just to forestall the possibility of some conversion from common to contract carriage." *Ibid.*; see also *id.* at 41a-42a, 46a-47a.

Petitioners also contend (Pet. 8-9, 12-13) that the tariffs are necessary to prevent contract carriers from charging predatory rates, and that the ICC will be unable to regulate rates if tariff filings are not required. Both aspects of this contention are factually unsound. As the Commission and the court of appeals found, the competitive structure of the motor carrier industry itself precludes predation. Truckers can readily shift their operations to a different market if a competitor prices below cost, returning to the market if the alleged predator seeks to extract monopoly profits. Predation simply cannot be a profitable strategy in this market setting. Pet. App. 45a, 74a-75a; see also *Southern Motor Carriers Rate Conference* v. *United States,* No. 84-8499 (11th Cir. Oct. 18, 1985), slip op. 353; *American Trucking Association* v. *United States,* 755 F.2d 1292, 1299 (7th Cir. 1985). Thus, the Commission and the court of appeals correctly found the threat of below-cost pricing insufficient to justify the burden of requiring continued contract carrier tariff filing.

Moreover, as two commissioners noted, no increase in predation had been observed after previous tariff exemptions: "[t]he experience so far has been a welcome increase in the vitality of this market without any serious indication of anticompetitive behavior." Pet. App. 82a; see also *id.* at

43a. Thus, the Commission's determination "to allow regulatory reform to go forward, and adjust for potential, but improbable, risks only if they do in fact materialize" (*id.* at 75a), plainly is reasonable. *Id.* at 47a, 49a; see also *American Trucking Associations* v. *ICC*, 656 F.2d 1115, 1123 (5th Cir. 1981) (rail exemption can be revoked if exempt carriers engage in destructive competitive practices).[8]

2. Finally, contrary to petitioners' contention (Pet. 14-16), this Court's decision in *Interstate Commerce Commission* v. *American Trucking Associations*, No. 82-1643 (June 5, 1984), is wholly irrelevant to the issues presented here. The Court held in *American Trucking Associations* that the Commission's discretionary authority to supplement express statutory remedies empowers the Commission to reject retroactively tariffs submitted in violation of rate bureau agreements (slip op. 4-5, 10-16). The Court held that "the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals" (*id.* at 10), and specifically concluded that "[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria; first, the power

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[8] Petitioners argue (Pet. 12-13) that this analysis is incorrect because suspension of a rate before it becomes effective is the only appropriate remedy in a case of predation. However, the Commission has only 30 days to determine whether to suspend a tariff before the tariff goes into effect (see 49 U.S.C. 10762(c)(3)). Since predation claims are complex and cannot be adequately assessed in this short time, the Commission has announced that it will not suspend proposed rates when it receives an allegation of predation. It will investigate such allegations in formal complaint proceedings pursuant to 49 U.S.C. 11701 so that all of the relevant evidence can be developed. See *American Trucking Association* v. *United States*, 755 F.2d at 1295-1299. Thus, petitioners' argument for the maintenance of the tariff filing requirement is unavailing because the Commission would not suspend a proposed rate because of an allegation of predation.

must further a specific statutory mandate of the Commission, and, second, the exercise of power must be directly and closely tied to that mandate" (*id.* at 13).

American Trucking Associations has no application here because this case involves exemption authority expressly conferred upon the Commission by Congress. The Commission's decision thus rests upon express authority, not upon implied authority of the type at issue in *American Trucking Associations.*[9] Moreover, as we have demonstrated, the Commission's exemption of contract carriers from burdensome tariff filing requirements clearly furthers the Commission's statutory mandate in this area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

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[9] Petitioners' reliance (Pet. 11-12) on *Central Forwarding, Inc.* v. *ICC*, 698 F.2d 1266 (5th Cir. 1983), is similarly misplaced because that case also involved a challenge to the Commission's exercise of implied authority.

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No. 85-252

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Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL & SOUTHERN MOTOR FREIGHT TARIFF ASSOCIATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioners submit this reply to the Brief of Respondents, filed November 13, 1985.

Petitioners contest two contentions of respondents:

(a) Respondents argue that public tariff filing by motor contract carriers is of no substantial benefit to competing motor common carriers because the contract carriers no longer publicly file their carrier-shipper contracts. Without recourse to those contracts, respondents contend, competing carriers cannot use the tariffs to make "easy" price comparisons, because the tariffs alone lack the necessary details. Brief of Respondents, at 3 (ftnt. 1), 7.

This argument is unsound. The publicly-filed tariffs of motor contract carriers must, by law, show the carriers' actual and minimum rates for transportation. 49 U.S.C. Sec. 10702(b). This is the information which Congress has deemed essential to protect motor common carriers

from destructive competition. The fact that motor carrier contracts are no longer filed publicly *increases*, not reduces, the need to continue tariff filing. Indeed, when the ICC decided to relieve motor contract carriers from contract filing, it cited its continuing oversight of publicly-filed tariffs as a sufficient protection of the public interest:

> Of course, the contract carriers are still required to enter into written bilateral contracts and to file with us a schedule of actual rates and charges. The standard remedies against unlawfulness are still available to any interested person by way of protest or complaint. We believe that the tariff publishing requirements imposed upon contract carriers by the Transportation Act of 1940 (49 U.S.C. 318, recodified at 49 U.S.C. 10762(a)(1)(B) afford an adequate means to achieve the ends which the Commission sought to achieve by establishing its regulations controlling the content and filing of the contracts.[1]

(b) Respondents argue that petitioners' fear of destructive competition from motor contract carriers is unfounded because increased competition in the industry makes predatory pricing unlikely. Brief of Respondents, at 8. This argument overlooks the fact that when Congress passed the Motor Carrier Act of 1980, 94 Stat. 793, P.L. 96-296—respondents' touchstone for the tariff-filing exemption—it continued to prohibit the ICC from giving "a motor or water contract carrier an advantage or preference in competition with a motor or water common carrier, respectively, if an advantage or preference is unreasonable or inconsistent with the public interest and the transportation policy of section 10101 of this title." 49 U.S.C. Sec. 10704. Respondents' easy equation between predatory pricing and the destructive competition by motor contract carriers which Congress has prohibited is not valid. Respondents' theory that common carriers can flee the predatory market, to return when and if the

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[1] Ex Parte No. MC-9 (Sub-No. 1), *Filing of Contracts by Contract Carriers by Motor Vehicle,* 45 Fed. Reg. 58865 (Sept. 5, 1980).

competing contract carrier raises its rates, ignores the economic impact upon the common carrier in the interim and ignores Congress's desire to maintain common carriage as a viable transportation mode.

CONCLUSION

Respondents have failed to answer Petitioners' basic contention that tariff filing by motor contract carriers is part of a three-part, interdependent statutory scheme to thwart destructive competition and assure the viability of common carriage. Without tariff filing, the ICC's power to suspend, investigate, and prescribe contract-carrier rates is a nullity. The fact that carriers no longer publicly file their contracts or that, arguendo, open entry discourages predatory pricing is no basis for ignoring the Congressional purpose.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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